Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

DAVID PAUL HAMMER,

Petitioner,

v.

JOHN D. ASHCROFT, HARLEY G. LAPPIN, KATHLEEN HAWK-SAWYER, and KEITH OLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 28 C.F.R. § 540.63, federal prisoners may be interviewed face-to-face by the press, unless the warden determines after an individualized inquiry that the interview would endanger the interviewer or "probably cause serious unrest or disturb the good order of the institution." However, after the broadcast of an interview with Timothy McVeigh, Attorney General John Ashcroft banned all face-to-face press interviews with male federal death row inmates. The Attorney General cited no security reasons, but stated that such prisoners should be denied "a podium" to communicate their ideas. Two questions are presented:

1. Whether the *en banc* Seventh Circuit erred in upholding this abridgement of First Amendment rights, when it held, contrary to decisions of the Second, Third, Eighth, and Ninth Circuits, that the "legitimate penological interest" required by *Turner v. Safley*, 482 U.S. 78 (1987), may be established as a matter of law through *post-hoc* litigation declarations referring to "security concerns," or, alternatively, by a court's ability to imagine or hypothesize such concerns, even where the stated reason for the abridgement was unconstitutional.

2. Whether the *en banc* Seventh Circuit erred by ignoring the four factor test set forth in *Turner* and by adopting a test of its own, under which it held that a permanent ban on face-to-face press interviews with male-death-row inmates, a sub-class of federal prisoners, does not violate the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner David Paul Hammer was the plaintiff-appellant below. Respondents John D. Ashcroft, Harley G. Lappin, Kathleen Hawk-Sawyer, and Keith Olson were defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

David Paul Hammer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit, by a vote of 5-to-3, reversed the unanimous panel decision in this case. The majority and dissenting opinions of the *en banc* court are reported at 570 F.3d 798 (7th Cir. 2009) and reprinted at App. 1a-30a. The panel opinion is reported at 512 F.3d 961 (7th Cir. 2008) and reprinted at App. 31a-48a. The memorandum opinion and order of the United States District Court for the Southern District of Indiana, which granted summary judgment in favor of respondents and dismissed petitioner's *pro se* amended complaint, is not reported, but is reprinted at App. 49a-62a. An earlier Seventh Circuit opinion, reversing the district court's dismissal of petitioner's original *pro se* complaint for failure to state a claim, is reported at 42 F. App'x 861 (7th Cir. 2002) and reprinted at App. 63a-70a. The district court's memorandum opinion and order dismissing the original complaint is not reported, but is reprinted at App. 71a-79a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment on June 25, 2009. (App. 1a). On September 15, 2009, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including October 23,

2009. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution and the pertinent provisions of Section 540.63 of Title 28, Code of Federal Regulations, and Institution Supplement THA-1480.05A are reprinted at App. 80a-84a, 103a-111a.

STATEMENT OF THE CASE

A. Introduction

To strike a proper balance between First Amendment rights and prison security, the Federal Bureau of Prisons ("BOP"), after notice-and-comment rulemaking, promulgated 28 C.F.R. § 540.63, which allows federal inmates to participate in face-to-face press interviews, unless the warden determines, after a individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a). Absent such a finding, the interview must proceed.

Following a nationally-televised interview with Timothy McVeigh, however, Attorney General John D. Ashcroft banned face-to-face interviews with all male federal death row inmates. (App. 90a). The Attorney General did not rely on any security concern or other "legitimate penological purpose," but on his personal view that such prisoners should

be prevented from communicating their ideas to the public. (App. 90a). He ordered the ban "to restrict a mass murderer's access to the public podium" and to prevent the "irresponsible glamorization of a culture of violence." (App. 90a). Warden Harley G. Lappin, who was then the warden at the United States Penitentiary at Terre Haute, Indiana ("USP-TH") (which houses all male federal death row inmates), subsequently memorialized the ban in Institution Supplement THA-1480.05A. (App. 103a-111a).

Petitioner David Paul Hammer, a male federal death row inmate, brought this *pro se* action to challenge the constitutionality of the ban. The district court dismissed his complaint for failure to state a claim (App. 79a), but the Seventh Circuit reversed and remanded, with instructions that the case proceed to discovery. (App. 70a). On remand, respondents refused to answer any of Mr. Hammer's *pro se* discovery requests. (7th Cir. JA at 76-86). The district court nonetheless granted respondents' motion for summary judgment and again dismissed Mr. Hammer's *pro se* claims. (App. 62a). On appeal, a panel of the Seventh Circuit unanimously reversed the district court's dismissal order, and once again remanded for discovery and trial. (App. 48a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. By a 5-to-3 vote, the *en banc* court reversed the panel decision, holding that respondents were entitled to summary judgment because Mr. Hammer was not entitled to discovery and had not presented a triable issue. (App. 15a). According to the Seventh Circuit

majority, and contrary to the decisions of every other circuit to have considered the question, respondents' actual reasons for adopting the total ban were not relevant to the inquiry mandated by *Turner v. Safley*, 482 U.S. 78 (1987). According to the majority, *Turner*'s "legitimate penological interest" requirement may be satisfied, as a matter of law, by the submission of conclusory, *post-hoc* declarations as to the existence of "security concerns." (App. 10a-11a). Indeed, the majority held that *Turner* would be satisfied even without such declarations, if a court could simply imagine or hypothesize a "legitimate penological interest" for violating First Amendment rights. (App. 5a). Thus, summary judgment was appropriate, according to the majority below, even though Attorney General Ashcroft had cited only constitutionally impermissible reasons to justify the ban at the time he announced it.

B. Statement of Facts

Mr. Hammer, who was sentenced to death for killing a cellmate, resides at the Special Confinement Unit ("SCU") of USP-TH. (7th Cir. JA at 125).[1] The

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[1] Although Mr. Hammer's death sentence was later vacated, no date has been set for resentencing, and the government has been granted an extension of time to April 28, 2010 to state its intentions with respect to resentencing. *See United States v. Hammer*, No. 96-CR-239 (M.D. Pa. Aug. 27, 2009) (order granting United States an extension of eight months to indicate whether it will request a new death penalty phase trial); *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), *appeals dismissed*, 564 F.3d 628 (3d Cir. 2009). As respondents concede, Mr. Hammer continues to reside on death row and is subject to the policy. (App. 4a, 32a n.1).

SCU houses all male federal prisoners who have been sentenced to death. (7th Cir. JA at 200). In addition, the SCU houses prisoners who have not been sentenced to death, but who have been placed on "administrative detention status." (7th Cir. JA at 200).

Mr. Hammer has received many requests for press interviews to discuss conditions on death row, his own case, and other matters related to his confinement. In 1999, Mr. Hammer participated without incident in three face-to-face press interviews. (7th Cir. JA at 126-28). Those interviews were conducted under 28 C.F.R. § 540.63, which permits federal prisoners to participate in face-to-face interviews unless a warden determines, after an individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a).

On March 12, 2000, "60 Minutes" aired an interview with Timothy McVeigh, a federal death row inmate known as the Oklahoma City Bomber. (7th Cir. JA at 175). The public outcry was immediate. Among other things, on March 14, 2000, Senator Byron Dorgan sent a letter to BOP Director Kathleen Hawk-Sawyer, to demand that the BOP prohibit future interviews with federal death row inmates. (7th Cir. JA at 175).

No other face-to-face interview with a male federal death row inmate was ever allowed.[2] In late 2000 and early 2001, Mr. Hammer attempted to communicate with the press through press releases issued by his attorney, through personal written correspondence, and by using his ordinary 15-minute daily allotments of telephone time. Even in these contexts, Warden Lappin repeatedly warned Mr. Hammer that he was prohibited from disclosing "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172) (emphasis in original).

On April 12, 2001, Attorney General Ashcroft and BOP Director Hawk-Sawyer held a press conference announcing a categorical ban on face-to-face interviews with male federal death row inmates. That ban (which was not adopted pursuant to notice-and-comment rulemaking) permanently and categorically prohibits male federal death row inmates (but not female death row inmates, non-death row inmates housed on the SCU, or, indeed, any other inmate in the federal prison system) from having face-to-face interviews with any print or broadcast journalist on any subject at any time. (App. 95a-96a). The Attorney General explained:

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[2] From March 2000 until April 16, 2001, USP-TH Warden Lappin denied all media requests for face-to-face interviews with male federal death row inmates, including nine such requests for interviews with Mr. Hammer. (7th Cir. JA at 177-92). After April 16, 2001, THA-1480.05A was specifically invoked to bar such interviews. (App. 105a).

> As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. . . . I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

(App. 90a, 97a).

Four days later, Warden Lappin signed Institution Supplement THA-1480.05A, which purportedly was designed to "provide guidelines for implementing" the case-by-case review process required by 28 C.F.R. § 540.63. (App. 103a). In fact, THA-1480.05A did not "implement" the regulation; it negated the regulation insofar as death row inmates were concerned. In place of the case-by-case review required by 28 C.F.R. § 540.63, THA-1480.05A substituted a permanent and total ban, stating that "in-person interviews (including video-recorded interviews) will not be permitted." (App. 105a). In addition to banning the broadcast of recorded interviews, the policy banned all face-to-face interviews, even non-recorded interviews with print journalists. (App. 105a).

It is undisputed that THA-1480.05A does not apply (a) to prisoners housed on the SCU on "administrative detention status," (b) to female federal prisoners sentenced to death, (c) to other

federal prisoners who have been convicted of murder, but not sentenced to death, or (d) to other federal prisoners who may be objects of acute public interest because of who they are or what crimes they have committed. (App. 35a, 105a). With respect to each of those four groups of prisoners, interview requests remain subject to the case-by-case policy set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

C. Procedural History

Mr. Hammer filed an amended *pro se* complaint on January 2, 2003, claiming that THA-1480.05A violated both his First Amendment rights and his Fifth Amendment right to equal protection of the laws. He sought declaratory and injunctive relief, as well as damages, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (7th Cir. JA at 26-40).[3] Mr. Hammer served three separate *pro se* discovery requests. (7th Cir. JA at 56-62). Respondents objected to all of those requests and moved for summary judgment, without complying with any of the requests. (7th Cir. JA at 63-65, 76-86).

Mr. Hammer filed a *pro se* motion to extend the time for discovery under Fed. R. Civ. P. 56(f), but the district court denied that motion. (7th Cir. JA 87-90,

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[3] Mr. Hammer filed his original *pro se* complaint on April 24, 2001. The district court dismissed that complaint for failure to state a valid claim for relief. (App. 79a). Mr. Hammer filed a *pro se* appeal. The Seventh Circuit reversed and remanded the case for further proceedings, including discovery, on July 25, 2002. (App. 70a).

225). Thereafter, the district court granted summary judgment against Mr. Hammer, holding that "Hammer has not identified a genuine issue of material fact as to his claims . . . ." (App. 62a). Mr. Hammer filed a timely notice of appeal, and the Seventh Circuit later appointed counsel to assist Mr. Hammer with the briefing and argument of his appeal. (7th Cir. JA at 238-39).

On January 15, 2008, a panel of the Seventh Circuit unanimously reversed the district court's grant of summary judgment. The panel held that Mr. Hammer had raised a triable issue of fact as to whether the "proffered [security] justification for the policy banning face-to-face interviews is pretextual." (App. 32a). That was so, according to the panel, because Attorney General Ashcroft's contemporaneous explanation conflicted with respondents' litigation declarations and showed that the actual purpose of the ban was "to control a disfavored message rather than to secure the SCU." (App. 41a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. (App. 3a).

On June 25, 2009, the Seventh Circuit, by a 5-to-3 vote, held that "Institution Supplement THA 1480.05A is consistent with the Constitution." (App. 15a). In an opinion by Chief Judge Easterbrook, the court held that respondents' actual reasons for adopting the ban were not relevant because "[i]t is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a). The "good reasons," of course, were not those

stated at the time the ban was adopted, but those that respondents put forth in defense of Mr. Hammer's litigation, some three years later. Indeed, according to the majority, it was not necessary for respondents to provide any reasons at all, even after the fact. So long as a court could hypothesize "good reasons" for the ban, there was no need for discovery or a trial concerning the abridgement of Mr. Hammer's First Amendment rights. (App. 5a, 10a-11a). The majority further held that "[t]he Supreme Court did not search for 'pretext' in *Turner*; it asked whether a rule is rationally related to a legitimate goal. That's an objective inquiry." (App. 10a).

Three judges dissented. Judge Rovner, joined by Judge Bauer, noted that:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech.

(App. 16a).

Judge Wood dissented separately. Among other things, she noted that "the majority has . . . adopt[ed] a rule permitting wholesale censorship in prisons — one that goes much farther than anything the

Supreme Court sanctioned in *Pell v. Procunier*, 417 U.S. 817 (1974), or *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)." (App. 24a).

REASONS FOR GRANTING THE WRIT

1. This case raises a fundamental question of First Amendment law on which the courts of appeals are divided. In a 5-3 decision with far-reaching consequences, the *en banc* court held that a federal prisoner could not challenge the constitutionality of a policy prohibiting him from having face-to-face access to print or broadcast journalists, even if there was evidence to show that the ban was adopted for unconstitutional, content-based purposes.

Indeed, the evidence here was compelling: Attorney General Ashcroft stated that the purpose of the ban was to prohibit death row inmates from communicating their ideas to the public, not because of any reason related to prison security, but because the Attorney General deemed such prisoners, and any ideas they might express, to be repugnant and unworthy of First Amendment protection. (App. 90a, 97a). That evidence was irrelevant, according to the majority below, because respondents had provided litigation declarations asserting that the ban served a "legitimate penological interest." That evidence was also irrelevant, according to the majority below, because a court could "imagine" a legitimate purpose that might be furthered by the ban.

This Court has never held that the abridgement of First Amendment rights may be justified by after-the-fact or imagined reasons, or that the actual,

unconstitutional reasons for an abridgement of First Amendment rights should be ignored.

Clearly, the decision below conflicts with this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). In addition, the decision below conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, all of which have held that the existence of a "legitimate penological interest," and thus the constitutionality of restrictions placed on a prisoner's First Amendment rights, must be measured by reasons that were put forth at the time the policy was adopted. In those courts, unlike the Seventh Circuit, First Amendment rights do not give way to *post-hoc*, let alone hypothetical, explanations. *See Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006); *Abu-Jamal v. Price*, 154 F.3d 128, 132-34 (3d Cir. 1998); *Quinn v. Nix*, 983 F.2d 115, 118-19 (8th Cir. 1993); *Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir. 1990).

2. Although this Court has held that prison restrictions on First Amendment rights are to be evaluated under the four-part test articulated in *Turner v. Safley*, 482 U.S. 78 (1987), the Seventh Circuit barely mentioned any of the *Turner* factors and effectively created an analytical framework that stands in competition with *Turner*. The Seventh Circuit's decision did not even purport to address the question whether THA-1480.05A "is reasonably related to legitimate penological interests" under the four-factor *Turner* test, and it never considered whether the ban provided male federal death row inmates with any reasonable alternative means for

communicating with the press. *See Turner*, 482 U.S. at 89-90. Furthermore, the decision below constitutes a dangerous innovation in First Amendment law: no other reported decision has ever upheld the constitutionality of a *permanent* restriction on the First Amendment rights of a *sub-class* of prisoners, particularly a sub-class identified solely based on gender and sentence. Indeed, this Court previously has expressed skepticism that a permanent ban on the First Amendment rights of a sub-class of prisoners could ever be deemed "reasonable" under the *Turner* criteria. *Beard v. Banks*, 548 U.S. 521, 535-36 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003). This case squarely presents that question.

I. The Decision Below Conflicts With Prior Decisions Of This Court, And With Decisions Of Other Federal Courts Of Appeals, By Holding That *Turner*'s "Legitimate Penological Interest" Requirement May Be Satisfied By *Post-Hoc*, Litigation Declarations Or By Purely Hypothetical Explanations, Even Where Contemporaneous Statements Show That The Restriction Was Adopted For Patently Unconstitutional Reasons.

This Court has long recognized that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . justified by the considerations underlying our penal system.'" *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (*quoting Price v. Johnson*, 334 U.S. 266, 285 (1948)). But this Court also has recognized that

there is no "iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

Indeed, this Court has recognized that the ability to share one's ideas and opinions with others is a fundamental right that is central to the concept of human personhood and citizenship in a democratic society. As Justice Brandeis noted long ago:

> Those who won our independence . . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The right to communicate one's thoughts — a right that is no less important to those who have lost their physical freedom — is not extinguished by conviction and incarceration. Once the requirements of prison security have been satisfied, "a prison inmate retains those First Amendment rights that

are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Johnson v. California*, 543 U.S. 499, 510 (2005). In that way, our law gives recognition to the fundamental principle that "persons are sent to prison as punishment, not for punishment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977); *see also* Mary Bosworth, *The U.S. Federal Prison System* 53 (2004).

To reconcile the First Amendment rights of prisoners with legitimate penological demands, this Court, in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), announced a framework for evaluating the constitutionality of prison regulations. In *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. To structure that inquiry, the Court adopted a four-factor test, focused on: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether "alternative means of exercising the right . . . remain open to prison inmates"; (3) whether accommodating the constitutional right will significantly impact prison resources; and (4) whether there are "ready alternatives" that could address the penological interest without infringing on constitutional rights. *Id.* at 89-91.

In *Turner*, this Court did not specifically explain how, in the context of *Turner*'s first requirement, the requisite reasonable relationship between a restriction and a legitimate penological purpose was to be established. *Id.* at 89. In subsequent cases, the Court likewise has not had occasion to consider whether a "legitimate penological interest" must be articulated at the time the policy is adopted. Thus, while this Court has held that *Turner* requires courts to "accord substantial deference to the professional judgment of prison administrators," *Bazzetta*, 539 U.S. at 132, the Court did not consider whether such deference must be given to non-contemporaneous explanations offered only in litigation declarations authored by lawyers long after the fact. Certainly, no case from this Court suggests that a *post-hoc* explanation will be given conclusive effect in the face of contemporaneous statements which admit that the contested action was taken for constitutionally impermissible reasons. Moreover, relevant decisions from the courts of appeals have categorically rejected that notion.

In addition, this Court has never suggested that the *Turner* test will be satisfied whenever the reviewing court can "imagine" a legitimate penological interest. Indeed, the holding below simply negates this Court's decision in *Turner*, which assumed that the courts would inquire into the adequacy of the real reasons for administrative action, rather than some hypothetical reason that might be conjured to justify the administrative

determination. That is not the standard by which administrative action is evaluated.[4]

The Seventh Circuit held otherwise. The Seventh Circuit noted that Mr. Hammer had presented evidence (including the Attorney General's contemporaneous explanation for his actions) to show that "those who adopted or approved THA 1480.05A took content or viewpoint into account"

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[4] This Court often has had occasion to hold that administrative determinations may be upheld only on grounds that the agency actually relied on at the time it acted, and that the propriety of an agency's action must be evaluated based on a properly developed administrative record. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("*Chenery I*"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50-52 (1983). "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery II*, 332 U.S. at 196-97.

A reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency [at the time it acted]. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* at 196; *accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 419-20 (1971). Contrary to the decision below, untested, *post-hoc* litigation affidavits cannot fill that void, particularly where, as here, the affidavits directly contradict the rationale given by the decision-maker at the time he acted. *See Overton Park*, 401 U.S. at 419; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Chenery I*, 318 U.S. at 87.

when they adopted the permanent ban. (App. 7a, 8a-9a). According to the Seventh Circuit, however, a contemporaneous admission of an unconstitutional purpose was not relevant to *Turner*'s "legitimate penological interest" requirement, so long as the court record contained a *post-hoc* litigation declaration asserting that the challenged action furthered some legitimate penological interest. (App. 10a-11a). Indeed, the Seventh Circuit held that a court could enter summary judgment so long as it could hypothesize a plausible permissible penological interest, even where a patently unconstitutional, contemporaneous explanation had been given. (App. 5a, 10a-11a). The Seventh Circuit majority stated: "It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a).

The Seventh Circuit's decision clearly conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, which have held that the only relevant "penological interest" is that which *actually* motivated the policy's adoption.

In *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), the Second Circuit reversed a district court's dismissal, on summary judgment, of a prisoner's challenge to a rule requiring Sunni and Shi'ite Muslim inmates to participate in joint Ramadan services, as well as the dismissal of his claim that he was denied the opportunity to participate in Islamic holiday services while placed in disciplinary keeplock. The Second Circuit held that "[u]nder both *Turner* and *O'Lone*, once a prisoner shows that a

prison regulation impinges on a protected right, prison officials must show that the disputed official conduct was motivated by a legitimate penological interest." *Salahuddin*, 467 F.3d at 276-77. According to the Second Circuit, *Turner*'s "legitimate penological interest" standard "requires the government to close the circle — prison officials must have been pursuing the interest in inmate safety when limiting" First Amendment rights. *Id.* at 277. "This requirement makes good sense because it ensures that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity." *Id.*

In *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), the Third Circuit ordered the district court to issue a preliminary injunction enjoining enforcement of a policy that prohibited inmates from running businesses after the policy was challenged by a death row inmate who was publishing articles, books, and radio commentaries. In that case, as here, the inmate had presented evidence to show that the "[t]he Department [of Corrections] began its investigation [into the inmate's press communications] under public pressure to do so, and because of the content of [his] writing," and that the decision to enforce the policy against him was "motivated, at least in part, by the content of his articles." *Abu-Jamal*, 154 F.3d at 134. Based on this evidence of an improper purpose, the Third Circuit held that the policy did not satisfy *Turner*'s "legitimate penological interest" requirement. *Id.* at 134, 137.

In *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), the Eighth Circuit likewise held that a "pretextual" *post-hoc* articulation of security concerns could not satisfy *Turner*, because "[p]rison officials are not entitled to the deference described in *Turner* and *Procunier* [*v. Martinez*, 416 U.S. 396, 404-05 (1974)] if their actions are not *actually* motivated by legitimate penological interests at the time they act." *Quinn*, 983 F.2d at 118 (emphasis added).

Finally, in *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990), the Ninth Circuit held that "[p]rison officials must 'put forward' a legitimate governmental interest to justify their regulation, and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced." *Id.* at 385-86 (internal citations omitted). *Post-hoc* declarations created for litigation were not sufficient to satisfy *Turner*. "Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests." *Id.* at 386.

The Seventh Circuit's holding directly conflicts with these decisions, as Judge Rovner recognized:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the

> application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech. The *en banc* opinion thus authorizes the government to deny the public a chance to hear directly from prisoners who can offer a glimpse of situations that may embarrass the government, such as torture and prisoner abuse, by invoking pretextual justifications for policies that are unrelated to security.

(App. 16a).

There is no constitutional right more precious in a democratic society than the right to speak, convey information about the workings of government, and communicate one's ideas, whatever they may be. Equally important is the right to receive information and to hear what others have to say about matters of public concern. In our day, much public attention has been given to the administration of the death penalty and to the proper treatment of prisoners. Indeed, these matters have been the subject of acute public attention and vigorous debate. In this context, the ban ordered by Attorney General Ashcroft does not simply abridge the First Amendment rights of those with special knowledge and a particular viewpoint, it impedes the right of all of us to hear what those individuals know and think.

Judge Wood illustrated this point with a vivid example:

> It is likely that the military authorities running the infamous Abu Ghraib prison would not have wanted the inmates talking to the media, either about their own experience or those of their fellow prisoners (some of whom may have been too injured, or too intimidated, to speak for themselves). Closer to home, the sad but true fact is that abuse by prison guards or police has not been entirely abolished. One prisoner might want to write letters that are self-aggrandizing, just as the authorities feared, but another might want to alert the media to the fact that human rights abuses were occurring in a place like the Special Confinement Unit.

(App. 28a).

The rights to speak and hear are too important in themselves, and play too important a role in the workings of a democratic society, to be extinguished by executive fiat simply because the Attorney General, no matter how wise or well-meaning, finds communications from a subset of federal prisoners to be personally repugnant. Justice Jackson identified the genius of our governmental system, and its relationship to First Amendment freedoms, when he wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Mr. Hammer may have been convicted of serious crimes, but he retains the right to speak, subject to the legitimate demands of prison security. And the rest of us, subject to those demands, have the right to hear what Mr. Hammer has to say. Neither the Attorney General nor the court below paid sufficient attention to that basic fact of democratic government, and the decision below requires review for that reason.

II. The Decision Below Departs From This Court's Prior Holdings By Disregarding *Turner* And Upholding The Constitutionality Of A Permanent Restriction On The First Amendment Rights Of A Sub-Class Of Prisoners.

This Court has repeatedly held that *Turner*'s four-factor analysis "contain[s] the basic substantive legal standard[s]" and is the proper inquiry for evaluating constitutional challenges to prison regulations. *Banks*, 548 U.S. at 528-29; *Bazzetta*, 539 U.S. at 132; *Thornburgh v. Abbott*, 490 U.S. 401, 404, 413-14 (1989); *O'Lone*, 482 U.S. at 348-50. The decision below warrants review for the additional reason that the Seventh Circuit simply disregarded *Turner* and its progeny, and chose to create its own standard for reviewing the constitutionality of prison restrictions.

Instead of assessing Mr. Hammer's claims under the *Turner* framework, the court below used the opinions in two older cases — *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*,

417 U.S. 843 (1974) — to fashion an alternative test. (App. 1a-2a, 4a-7a, 13a-14a).

Obviously, it is not the business of an intermediate appellate court to improve on this Court's jurisprudence. Even if it were, the court below erred because neither *Pell* nor *Washington Post* would support upholding THA-1480.05A. Unlike the policy upheld in this case, the press restrictions in *Pell* and *Washington Post* applied equally to all inmates in their respective prison systems. *Pell*, 417 U.S. at 819; *Washington Post*, 417 U.S. at 844. In addition, and also unlike the case at bar, it was undisputed in both *Pell* and *Washington Post* that the restrictive policies were actually motivated by legitimate "security" concerns. *Pell*, 417 U.S. at 826; *Washington Post*, 417 U.S. at 848-49.

Moreover, neither policy restricted an inmate's ability to communicate with the press through written correspondence (*Pell*, 417 U.S. at 824, 827-28; *Washington Post*, 417 U.S. at 847-48), whereas Mr. Hammer has been prohibited from communicating to the press "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172). As Judge Wood stated in dissent:

> [N]either *Pell* nor *Washington Post* approved a total ban on contact with the media. To the contrary, *Pell* relied on the existence of "alternative methods of communication that are open to prison inmates," 417 U.S. at 504, and *Washington Post* made clear that

> "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there," 417 U.S. at 518. *Washington Post* mentioned specifically the fact that "[o]utgoing correspondence from inmates to press representatives is neither censored nor inspected." *Id.* To the extent that the majority's opinion has swept away the need to show adequate alternative avenues for communication [under *Turner*'s second factor], it has, in my view, overstepped an important boundary that the Court has drawn.

(App. 29a). Unlike *Pell* and *Washington Post*, Mr. Hammer presented evidence creating a triable question as to whether any "reasonable alternatives" existed for him to communicate with the press regarding his case or his observations of prison conditions — both being subjects that he was prohibited from discussing in *any* manner because of the ban on communications regarding fellow inmates. (App. 110a; 7th Cir. JA at 172).

The court below also erred in holding that this Court's decisions in *Pell* and *Washington Post* can be extended to justify First Amendment restrictions applied only to a sub-class of prisoners — especially a sub-class defined solely by gender and sentence. While *Pell* and *Washington Post* may permit prison officials to bar all inmates equally from face-to-face communication with the media, the Constitution does not permit prison officials to grant the right to communicate with the press selectively, or to deny

face-to-face communication with the press to a disfavored group. *See Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) ("The Constitution forbids [the government] to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that government's power to proscribe "fighting words" generally does not include power to punish only "fighting words" directed at particular disfavored topics).

While real differences between male and female death row inmates (or between death row inmates and inmates convicted of similar crimes but not sentenced to death) might necessitate some differences in their conditions of confinement, it is not clear how those differences could ever be relevant to adopting, let alone justifying, differential treatment under the First Amendment. "Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [groups] on such a wholesale and categorical basis." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). This Court has recognized that "invidious distinctions [in the allocation of constitutional rights] cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Restricting only male federal death row inmates from face-to-face interviews with both print and electronic media (while allowing such access to all other federal prisoners, including female federal

death row inmates) fails even rational-basis analysis under *Turner*'s first criteria that a restriction be "reasonably related to legitimate penological interests." 482 U.S. at 89.

The permanent nature of the Attorney General's ban also offends the Constitution. Indeed, neither this Court nor any other court has approved a permanent restriction on First Amendment rights that applies only to a sub-class of prisoners, let alone a sub-class defined entirely by gender and sentence. This Court has upheld prison restrictions on First Amendment rights in two contexts. First, the Court has upheld "permanent" restrictions that apply equally and neutrally to an entire prison population. *See Abbott*, 490 U.S. at 409-10, 415-16; *Turner*, 482 U.S. at 81, 89-90; *O'Lone*, 482 U.S. at 350-52; *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979). Second, this Court has upheld *temporary* restrictions on First Amendment rights applied to a sub-class of recalcitrant inmates as a disciplinary sanction. *See Bazzetta*, 539 U.S. at 134; *Banks*, 548 U.S. at 535-36. No reported case, however, has upheld a permanent prison restriction on First Amendment rights applied only to a sub-class of prisoners based on gender and sentence.

Under 28 C.F.R. § 540.63, a federal prisoner will be permitted to participate in a face-to-face press interview unless his warden determines, after a case-specific inquiry, that permitting the interview would endanger the safety of the interviewer or "would *probably* cause *serious* unrest or disturb the good order of the institution." 28 C.F.R. § 540.63(g)(4)

(emphasis added) (App. 82a). Female federal death row prisoners, prisoners housed in the SCU with death row prisoners because of individualized security concerns, and all other non-death row prisoners are entitled to have press interview requests evaluated by their respective wardens, on a case-by-case basis, under the test set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

In the case of male death row prisoners, however, no such case-by-case analysis is available, and the warden has no duty to make the reasoned decision required by 28 C.F.R. § 540.63. Instead, male inmates sentenced to death are categorically prohibited from having face-to-face press interviews by THA-1480.05A. (App. 105a).

This Court has previously expressed skepticism that a permanent restriction on the First Amendment rights of a sub-class of prisoners could ever satisfy the *Turner* standard. In *Bazzetta*, 539 U.S. at 134, the Court stated:

> We agree the restriction is severe. And if faced with evidence that [the] regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case. . . .

539 U.S. at 134; *see also Banks*, 548 U.S. at 536.

Here, of course, those issues are squarely presented. The Seventh Circuit went well beyond this Court's jurisprudence by upholding a ban on

First Amendment rights that was both "severe" and "permanent" and applied only to "certain inmates." It is not surprising that the Seventh Circuit declined to evaluate the ban at issue in this case under the *Turner* framework. The reason is clear: it is inconceivable that the First Amendment restrictions imposed by THA-1480.05A could ever pass muster under *Turner* and its progeny. This case warrants review for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit

DAVID PAUL HAMMER, Plaintiff-Appellant,
v.
JOHN D. ASHCROFT, et al., Defendants-Appellees.

No. 06-1750

ARGUED SEPTEMBER 10, 2008—
DECIDED JUNE 25, 2009

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 01-0558-C-T/G—John Daniel Tinder, Judge.

Before EASTERBROOK, Chief Judge, and BAUER, POSNER, KANNE, ROVNER, WOOD, EVANS, and SYKES, Circuit Judges.†

EASTERBROOK, Chief Judge. "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). The Supreme Court applied that principle in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), when holding that the Federal Bureau of Prisons did not violate the Constitution by preventing face-to-face interviews between reporters and inmates.

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† Circuit Judges Flaum, Williams, and Tinder did not participate in the consideration or decision of this appeal.

In the years after *Washington Post* the Bureau authorized some in-prison interviews. By the late 1990s reporters could talk to prisoners throughout the federal system. See Program Statement 1480.05 (News Media Contacts) (promulgated Sept. 21, 2000, and in force since). That changed in 2001, however, for inmates housed in some of the Bureau's most-secure locations—including the "Special Confinement Unit" at the prison in Terre Haute, Indiana, which houses most federal prisoners under sentence of death, plus some others in administrative detention for disciplinary or security reasons.

Program statements generally applicable to federal prisons may be modified by institution-specific supplements. See Program Statement 1480.05(13) (applying this exception-making power to media contacts in particular). The Warden of Terre Haute proposed, and the Bureau's Director approved, Institution Supplement THA 1480.05A, which bans person-to-person meetings between reporters and inmates of the Special Confinement Unit, though it allows phone calls and correspondence. (The current revision, THA 1480.05B, contains the same rule; for simplicity we refer only to THA 1480.05A.) Phone calls with reporters are subject to Program Statement 1480.05(7)(d), which provides that "[a] representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed." Correspondence is unlimited; an inmate's letters to reporters are not subject to inspection or censorship.

"All properly identified and labeled correspondence from an inmate who is not on restricted mail status to qualifying representatives of the news media shall be sealed and forwarded without inspection, directly and promptly." Program Statement 5265.11(17)(a) (July 9, 1999).

David Paul Hammer, who was sentenced to death for killing another federal prisoner, contends in this suit under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), that he is entitled to money damages from former Attorney General Ashcroft and other public officials who drafted or approved THA 1480.05A. Relying on *Pell* and *Washington Post*, the district court granted summary judgment for the defendants. 2006 U.S. Dist. LEXIS 9306 (S.D. Ind. Feb. 23, 2006). A panel of this court reversed, 512 F.3d 961 (7th Cir. 2008), and that decision was vacated in turn by the order granting defendants' petition for rehearing en banc.

Hammer's attempt to obtain damages has complicated matters. The validity of federal administrative rules usually is resolved in actions under the Administrative Procedure Act seeking prospective relief, not in suits for money against officials whose positions and roles generally entitle them to qualified if not absolute immunity. A district judge held the policy valid, after all. Although the panel thought that, on an enlarged record, Hammer might yet prevail, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing

side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Accord, *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009). Indeed, a *Bivens* action is improper when statutes specify how administrative deeds are reviewed. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2597–2605 (2007). But because we agree with the district court that THA 1480.05A is valid, we sidestep the complications introduced by Hammer's quest for damages. (Hammer's death sentence was set aside in 2005, *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), but he remains in the Special Confinement Unit pending appeal, now under advisement in the Third Circuit, and so has an ongoing interest in the rule's constitutionality. His other sentences exceed 1,200 years' imprisonment, so release is not imminent.)

Pell v. Procunier and *Saxbe v. Washington Post* establish that the Bureau of Prisons could enforce a system-wide rule against personal or video interviews between prisoners and reporters. Hammer contends, however, that by curtailing press access to some prisoners but not others, the Bureau offends the equal-protection component of the due process clause in the Constitution's fifth amendment. Yet it is hard to understand why all prisoners should be treated the same. Some are in minimum-security prisons and others in more secure confinement; no one thinks these differences unconstitutional. The Justices observed in *Pell* and *Washington Post* that the principal reason for limiting press contacts is the maintenance of security; this implies that the greater the need for security at a given prison (or unit within

a prison), the easier it is to justify limits on meetings between reporters and prisoners. By the time the Court decided *Washington Post*, the Bureau of Prisons had begun to allow reporters to interview inmates of minimum-security prisons. *See* 417 U.S. at 844 & n.2. The Justices did not perceive any problem in this distinction. It is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the Special Confinement Unit at Terre Haute) than at all medium- and maximum-security prisons.

Hammer's argument amounts to a contention that, once a prison system starts to allow access more liberally, it must go all the way; any intermediate position violates equal-protection principles. That understanding is inconsistent with many established doctrines. For example, thirty years ago a court held that Congress had violated equal-protection limits by subjecting members of the diplomatic service, but not other federal workers, to mandatory retirement. The Justices held, however, that it is possible to draw such lines as long as a rational basis for them may be imagined; the basis need not be supported in the record. *Vance v. Bradley*, 440 U.S. 93 (1979). Just as it was possible to imagine a rational basis for distinguishing diplomats from postal carriers, so it is possible to imagine a rational basis for distinguishing the nation's most secure institutions from others. Indeed, to state the distinction is to furnish the justification: security.

The security justification that carried the day in *Pell* and *Washington Post* was that interviews with the press make celebrities of some inmates. This increases tensions within prisons (those who don't receive public attention may react with envy); and if some inmates use the press to disparage others (or their beliefs, or the organizations to which they belong), the tensions will be greater. More: the interviewed prisoners get swelled heads and "tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." *Washington Post*, 417 U.S. at 848–49. Prisons for tax evaders and credit-card forgers may tolerate such tensions; prisons for killers are more explosive, and the need to prevent lighting the fuse to the powder keg is compelling.

Hammer maintains that prisons must use the least-restrictive available options and that the Bureau's experience since *Washington Post* shows that the risks associated with interviews are manageable. This line of argument marks a transition from equal protection to the first amendment, for it incorporates elements of both bodies of doctrine. But this, too, is a tired theme. It has been made in several cases dealing with press interviews and correspondence among prisoners, and the Justices have rejected it. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 409–14 (1989); cf. *Shaw v. Murphy*, 532 U.S. 223 (2001). The question is not whether prisons could find ways to accommodate one or another change. It is whether the rule that the prison chooses to implement is "reasonably related to legitimate security interests."

Turner v. Safley, 482 U.S. 78, 91 (1987). And the Court has held in *Pell* and *Washington Post* that a no-interview policy *is* "reasonably related to legitimate security interests." The Justices added that an attempt to be "less restrictive" by making individual decisions could undermine security: "such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows." *Washington Post*, 417 U.S. at 849.

Hammer maintains, however, that the Bureau has engaged in content or viewpoint discrimination by silencing inmates on death row. This may well be true of a selective (or "less restrictive") approach; wardens who allow some prisoners but not others to invite the press into their cells might well take account of what they expect the inmates to say or the reporters to relate to the public. But a blanket ban—*no* inmate in a given prison or unit may meet face-to-face with *any* reporter—is neutral with respect to both content and viewpoint. This is one reason why the Justices approved the policies at issue in *Pell* and *Washington Post*, giving the exception-free quality of the policies as proof that the decisions were not based on content. *See Pell*, 417 U.S. at 825–26.

Perhaps Hammer's point is not that the *rule* employs content or viewpoint as a ground of decision, but that those who adopted or approved THA 1480.05A took content or viewpoint into account when deciding to change the rules for some federal prisoners but not

others. This line of argument starts with the fact that reporters freely interviewed inmates of the Special Confinement Unit, including Hammer himself, for the first nine months of the Unit's existence—until shortly after an interview with Timothy McVeigh was broadcast by CBS on "60 Minutes" in March 2000. (The Special Confinement Unit was established in July 1999; Hammer and McVeigh were among its first inmates.) McVeigh had been sentenced to death for killing 168 people by bombing the Murrah Federal Building in Oklahoma City. He used the forum of national TV to justify and extol terrorism. Shortly after the interview was broadcast, Byron Dorgan, who represents North Dakota in the Senate, wrote to Kathleen Hawk-Sawyer, Director of the Bureau of Prisons, complaining about the interview. Senator Dorgan stated, among other things:

> The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society, but will also prevent him from further intrusion in our lives through television interviews and from using those forums to advance his agenda of violence.

About a month after Senator Dorgan sent that letter, Attorney General Ashcroft and Director Hawk-Sawyer announced arrangements for closed-circuit telecasting of McVeigh's execution and took some questions. Ashcroft also announced that the Bureau would replace its case-by-case evaluation system with a prohibition on in-person interviews of inmates

at the Special Confinement Unit. Hammer finds telling these statements:

> I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims.
>
> . . .
>
> I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

On April 15, 2001, three days after the press conference, Harley Lappin, the Warden of Terre Haute, issued Institution Supplement THA 1480.05A.

Hammer wants discovery during which former Attorney General Ashcroft, former Director Hawk-Sawyer, and former Warden Lappin must explain under oath why they adopted the policy in question. If a belief that terrorists should not be able to obtain publicity by committing murder played a role in the decision, Hammer contends, the motivation for the policy is infirm, and the policy itself would fall with the bad motive.

It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons. *See Mueller v. Allen*, 463 U.S. 388, 394–95 (1983). The Supreme Court did not search for "pretext" in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry. If motive matters, why examine the thoughts of those who adopted the rule to the exclusion of those who have maintained it in force?—Attorney General Gonzales, Solicitor General Clement (who authorized the petition for rehearing en banc), Attorney General Mukasey (who was in office when the Department of Justice defended the policy before the en banc court), and Attorney General Holder, who could revoke THA 1480.05A with one sentence plus a signature but has not done so. (There is no special burden to justify a change of administrative policy. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 & n.2 (2009).)

Nor do we see how a demand that a Cabinet officer give testimony about his thinking could be squared with *United States v. Morgan*, 313 U.S. 409 (1941), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990). These decisions hold that courts evaluating the validity of an administrative action may not enlarge the administrative record by demanding that the people who proposed or approved the rule testify about their thinking. *See also* Richard J. Pierce, Jr., I *Administrative Law Treatise* § 8.6 (2002).

For current purposes, however, we assume that Attorney General Ashcroft's successors share his views. There's nothing unconstitutional about them, so we need not decide whether they led to the policy's adoption and maintenance, how motivation could be proved consistent with *Morgan*, or what role it plays in evaluating a policy's validity. Opposing a "culture of violence" is an ordinary, and desirable, goal for a criminal prosecutor. Attorney General Ashcroft's statements combine the idea that criminals should not be allowed to benefit from their deeds (see *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. 105 (1991) (a state may apply all of a criminal's income, including royalties from books, to satisfy restitution awards, though it can't pick and choose among books)) with variations of propositions that can be found in *Pell* and *Washington Post*.

One of the reasons that state and federal prison administrators gave for curtailing press access was that they did not want people to become celebrities by committing crimes. The Justices thought this a good basis to curtail press access, not a constitutionally infirm one. *See Washington Post*, 417 U.S. at 848-50. This is a reason why prisoners are separated from society: Most prisons are remote, and access to them tightly controlled, not simply to make escape difficult, but because solitude is a legitimate part of punishment. Becoming a celebrity makes crime more attractive—and if not so attractive as to outweigh the costs of prison, still anything that reduces the (effective) punishment for crime is of legitimate concern to Attorneys General

and prison officials. For murderers on death row or serving life sentences, celebrity is *especially* attractive, as these persons do not expect to return to the civilian world. They will receive few other rewards in life.

Some criminal acts are both costly to society and potentially attractive to imitators; the most notorious criminals can be trend-setters. Timothy McVeigh was such a person. He had a following, and one of his admirers was recently convicted of threatening to blow up a federal building in Milwaukee. *See United States v. Parr*, 545 F.3d 491 (7th Cir. 2008). Other "cause" criminals want to recruit; think of those who blow up abortion clinics and kill physicians. Social interests in curtailing and punishing crime support keeping these prisoners in seclusion. No one doubts—at least, no one *should* doubt—that a person serving time for tax evasion may be prevented from using the prison print shop to run off tracts advocating the proposition that the sixteenth amendment is invalid and no one need pay a penny of taxes. *See United States v. Benson*, 561 F.3d 718 (7th Cir. 2009) (affirming an injunction that prevents a convicted tax evader from selling a "16th Amendment Reliance Package" that purports to give other tax protesters a means to avoid both payment and criminal liability). If what Attorney General Ashcroft said in April 2001 evinces an unconstitutional motive, much of what this court wrote in *Benson* suffers from the same failing.

Naturally, Hammer insists that he is no McVeigh and would not use the press to promote murder. He wants to speak instead about prison conditions, his current professed respect for life, and what he sees as misconduct by guards and wardens. A system of rules that permitted prison administrators to conceal beatings or starvation of prisoners, violations of statutes and regulations, and other misconduct would be intolerable. The Court said as much in *Pell* and *Washington Post*. It was important to both decisions that all prisoners could correspond freely with reporters, even though face-to-face interviews were impossible. *See Pell*, 417 U.S. at 824–28; *Washington Post*, 417 U.S. at 847–48. Hammer sees this as an opening, because (he says) the Bureau of Prisons does not allow any uncensored channel of communication to the press.

This line of argument relies on Program Statement 1480.05(7)(d), which we quoted at the outset of this opinion. It provides: "A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed." As far as we can tell, this rule applies to interviews (in person or by telephone) but not to correspondence. Program Statement 5265.11(17)(a), which sets out the rules for written exchanges, says that "[a]ll properly identified and labeled correspondence from an inmate who is not on restricted mail status to qualifying representatives of the news media shall be sealed and forwarded without inspection, directly and promptly." That's exactly the sort of uncensored outgoing

correspondence that the Court deemed adequate in *Pell* and *Washington Post*. (Hammer does not contend that persons held in the Special Confinement Unit are "on restricted mail status" or that the prison has ever red-penciled any letter he sent to a reporter.) The limit on information about other inmates deals only with oral interviews. And if Hammer were to prevail in this suit, he would not be rid of Program Statement 1480.05(7)(d), for it covers in-person and televised interviews as well as phone interviews.

To the extent that Hammer may be contesting the validity of Program Statement 1480.05(7)(d) as applied to phone calls with the press (the only way it affects him), he has not established any constitutional problem. The restriction is a rational one, for reasons covered in *Pell* and *Washington Post*. Telling tales about fellow inmates may make them angry (if the tales are defamatory) or may make yet other inmates envious (if the tales are flattering). In either event, disorder may follow. As the district court put it, "insults or provocations, real or imagined, can result in inmate-on-inmate violence and thus can have dire consequences for inmates, penitentiary staff, and the public at large." 2006 U.S. Dist. LEXIS 9306 at *11-*12. Defamation is less likely if the other inmate agrees to talk to the press; Hammer may discuss such inmates by phone with reporters. And if, to take the worst case, another inmate is beaten and unable to talk, Hammer remains free to send a letter informing a reporter about that event. *Pell* and *Washington Post* held that

free correspondence supplies the needed channel of communication; Hammer has that plus 15 minutes of telephone time a day.

Correspondence is not the only way to expose misconduct by guards and administrators. Prisoners are free to file lawsuits, and papers sent to courts (or lawyers) cannot be censored. *See Bounds v. Smith*, 430 U.S. 817 (1977); *Procunier v. Martinez*, 416 U.S. 396 (1974). So the limit in Program Statement 1480.05(7)(d) is not going to conceal any misconduct in which the public has a legitimate interest.

Institution Supplement THA 1480.05A is consistent with the Constitution, and the judgment of the district court is

AFFIRMED.

ROVNER, *Circuit Judge*, with whom Judge Bauer joins, dissenting. The original panel's opinion was firmly rooted in the Supreme Court's long-standing rule that a prison regulation infringing on an inmate's constitutional rights is valid only if "it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). When a prisoner challenges a prison policy on constitutional grounds, the government must put forward a "legitimate" government interest to justify the restriction. *Id.* Suppressing speech because government officials find the content offensive is not a legitimate penological interest. *Id.* at 90. The original panel concluded that David Paul Hammer presented evidence that created a question of

material fact that the district court overlooked: is the jailhouse-celebrity concern articulated by the warden "legitimate," or is it simply a convenient explanation to justify a policy designed to control the speech content of a particular subset of prisoners? Given the fact dispute, the original panel reached the limited—indeed, even pedestrian—conclusion that a trier of fact must resolve the conflict.

Today's en banc opinion is almost entirely unmoored from the original panel's narrow treatment of the issues presented in this appeal. With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech. The en banc opinion thus authorizes the government to deny the public a chance to hear directly from prisoners who can offer a glimpse of situations that may embarrass the government, such as torture and prisoner abuse, by invoking pretextual justifications for policies that are unrelated to security. For the reasons set forth in the original panel's opinion, I dissent. I write separately only to memorialize my additional disagreement with the unexpected breadth of the en banc opinion.

Let me begin with the most troubling aspect of today's opinion: the majority's willingness to push

aside Attorney General Ashcroft's statement that "as an American who cares about our culture" and is "concerned about the irresponsible glamorization of a culture of violence," he wanted to prevent death-row inmates, and only death-row inmates, from engaging in face-to-face interviews with the media on any subject. This rationale for censorship assumes that what death-row inmates have to say, if broadcast outside the prison, necessarily corrodes American culture. But First Amendment jurisprudence is grounded in the idea that the government may not prevent a person, including a prisoner, from speaking merely because it disapproves of the speaker or what the speaker might say. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "content-based restrictions are presumptively invalid"); *Turner*, 482 U.S. at 90 (stating that prison regulations that infringe on inmates' First Amendment rights must operate "in a neutral fashion, without regard to the content of the expression"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."). Indeed, this court has recognized that the government may not pass speech restrictions in an effort to preserve its own notions of valued American culture:

> Racial bigotry, anti-semitism, violence on television, reporters' biases-these and many more influence the culture and shape our socialization. None is directly answerable by

> more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

See American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.). Yet Attorney General Ashcroft said publicly that preserving his version of American culture is exactly why the Bureau decided to limit death-row inmates' access to the media.

In order to circumvent this problem, the majority applies its own interpretive spin to Attorney General Ashcroft's statements and decides that the Attorney General meant that "criminals should not be allowed to benefit from their deeds." The majority thus concludes that Attorney General Ashcroft articulated a legitimate penological purpose to the interview ban because he saw restricting face-to-face interviews as a form of punishment or deterrence. But that is a question for a fact finder, who might reject this post-hoc rationalization and instead take Attorney General Ashcroft at his word and conclude that what actually "shaped" his mind in enacting the ban is his desire to prevent death-row prisoners from influencing our "culture." That desire is not a legitimate penological purpose.

The majority's comparison of this case to *United States v. Benson*, 561 F.3d 718 (7th Cir. 2009), is

unhelpful. In *Benson* we held that a convicted tax offender may not market materials that encourage other people to evade tax laws. *Benson* dealt with commercial speech, which occupies its own niche in First-Amendment jurisprudence, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980), and concluded that it is permissible to enjoin a person from making false statements in connection with the sale of a product, *Benson*, 561 F.3d at 725-26. Even accepting the majority's assumption that Attorney General Ashcroft wanted to prevent inmates from encouraging violence, the parallel to *Benson* is unpersuasive. Deceiving the public into buying a product designed to evade payment of required taxes is illegal, *see* 26 U.S.C. § 6700(a); advocating unpopular ideas is not, *see Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).[1]

The original panel was also concerned that the Special Confinement Unit's prohibition on face-to-face interviews does not leave sufficient alternatives for death-row inmates to access the media. Today's opinion concludes that the alternatives are sufficient because death-row inmates have 15 minutes of telephone time each day that they can use to speak with reporters, and because they are entitled to unlimited correspondence. But the government concedes that death-row inmates are not allowed—

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[1] Of course the government may regulate speech that amounts to incitement of violence, *see Brandenburg*, 395 U.S. at 447, but not even today's majority suggests that Ashcroft intended the media ban to target that category of speech.

through any method of communication—to discuss other inmates with members of the media. I am particularly troubled by this aspect of the policy because it may prevent inmates from reporting prison abuse. Under the current policies an inmate could be disciplined for informing the media—whether on the phone or by letter—that another inmate is being abused by a guard. When this concern was raised at the en banc argument, counsel for the defendants asserted that a victimized inmate could report the abuse himself. But that suggestion ignores the reality that any guard who abuses an inmate is likely to pressure his victim not to disclose the abuse, and such threats are particularly effective.

Today the majority brushes aside this concern, because "as far as [it] can tell," the ban on talking about other inmates does not apply to written correspondence. It relies on a program statement that says that outgoing mail to the media is sent without inspection. But at the en banc argument, counsel for the defendants said that all mail sent by inmates at the Special Confinement Unit must be given to prison officials unsealed for inspection before it is mailed. When asked what would be the consequence to an inmate who sends a letter discussing another inmate, counsel for the government had no answer. Thus our original fears are unabated; on this record we cannot tell whether there is any satisfactory alternative for inmates at the Special Confinement Unit to give the media any information that involves other inmates.

Which leads to another concern that today's opinion glosses over completely—Hammer was denied the opportunity to create a full record at the summary judgment stage. As discussed in the original opinion, the government moved for summary judgment before the close of discovery and only then responded to Hammer's discovery requests by objecting to them. Hammer asked for a continuance to allow him to build an adequate record, but the district court did not rule on his motion before the deadline for his summary-judgment response. To avoid missing his deadline, Hammer was forced to respond without receiving any discovery from the defendants. Today's opinion is quick to fill in the blanks itself in the face of ambiguity about the interests underlying the challenged policy. That is a task that may not have been necessary had Hammer had the chance to conduct proper discovery or if the district court had granted any of Hammer's three requests for counsel.

The majority's treatment of Hammer's equal-protection argument is also untethered from the governing legal standard and the facts of this case. The majority assumes that the media ban applies to all inmates housed in the Special Confinement Unit and concludes that the policy passes constitutional muster because the majority can "imagine a rational basis for distinguishing the nation's most secure institutions from others." But the parties agree that the media ban applies only to those members of the Special Confinement Unit who are under a death sentence. It is not, as the majority assumes, a unit-

wide ban, as not all inmates at the Special Confinement Unit are death-row inmates. That distinction casts doubt on the legitimacy of the "jailhouse celebrity" concern articulated by the government because, as Hammer point out, it is irrational to distinguish among inmates based solely on their particular sentence. Under the policy as applied by the Bureau of Prisons, famous mafia members, leaders of violent drug gangs, and the former governor of Illinois may all meet face-to-face with the press. But an unknown inmate under a death sentence may not because, the Bureau says, such access could make them "jailhouse celebrities." It is unclear why speaking in-person with a journalist would give an unknown death-row inmate more influence over other prisoners than would, for example, allowing Martha Stewart or George Ryan to give face-to-face interviews during their incarceration, which they would have been or are free to do under the Bureau's policies. As the majority points out, distinguishing among inmates risks "engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows." *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). Yet here the Bureau of Prisons applies the media ban in such a way as to risk the very dangers it says it wants to avoid.

Finally, the majority is concerned that a remand in this case could subject the former, and perhaps current, Attorney General to discovery, and that any demand for his testimony would rub up against

United States v. Morgan, 313 U.S. 409 (1941). The *Morgan* cases hold that an agency head should not be required in litigation to explain all of the considerations that went into a decision that was the result of formal rulemaking or a quasi judicial proceeding. *Id.* at 421-22. Administrative decisions must be judged based on the administrative record or evidence adduced by the parties. The *Morgan* principle is not offended here because the media ban was not the result of any formal agency process. On the contrary, there was neither notice nor a hearing before the media ban went into effect. Accordingly, even if on remand Hammer sought to depose Attorney General Ashcroft—who, after all, chose to speak publicly about the rationale behind the media ban—such scrutiny would not upset "the integrity of the administrative process." *Id.*

I believe that in the rare circumstances where a prisoner submits evidence casting doubt on the legitimacy of the security rationale supposedly supporting a policy, he deserves to have the chance to create a full record to shed light on those circumstances, and ultimately, to have a trier of fact resolve disputes of fact. I stand by that holding, and accordingly, I dissent.

WOOD, *Circuit Judge*, dissenting. Although I agree with much of Judge Rovner's dissent, I write separately in order to highlight my own concerns with the majority's opinion. Briefly put, they are as follows: first, the record does not support certain key assumptions made in the majority's opinion; second,

and related to the first point, it was error to grant summary judgment in favor of the defendants without permitting the plaintiff, David Hammer, to develop the record properly; and third, the majority has erred by adopting a rule permitting wholesale censorship in prisons—one that goes much farther than anything the Supreme Court sanctioned in *Pell v. Procunier*, 417 U.S. 817 (1974), or *Saxbe v. Washington Post* Co., 417 U.S. 843 (1974).

First, we must look at the record. Central to the majority's analysis is the assumption that inmate "[c]orrespondence is unlimited; an inmate's letters to reporters are not subject to inspection or censorship." *Ante* at 3. In support of this proposition, the majority cites Bureau of Prisons ("BOP") Program Statement ("PS") 5265.11(17)(a) (July 9, 1999). It then goes on to say that "[p]hone calls with reporters are subject to [PS] 1480.05(7)(d), which provides that '[a] representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.'" What the majority brushes over, however, is the fact that there is nothing in paragraph 7(d) of the Program Statement (or any other part of that Statement) that limits this restriction to information collected through telephone calls. In fact, materials in the record suggest strongly that the prohibition extends to all forms of communication. For example, the record includes a letter from Warden Lappin to a lawyer who published a news release that included statements that inmate Hammer made about other inmates. (Plaintiff's Appendix at A169.) The

Warden's letter rebukes the lawyer and informs him that 28 C.F.R. § 540.61(d) prohibits this publication. That regulation applies to all collection of information by the media, not just to telephone calls. *Id.* In a memorandum of December 22, 2000, from the Warden directly to Hammer, the Warden reprimands Hammer for providing information concerning other inmates "during a recent news media interview." (Plaintiff's Appendix at A171.) The memorandum says nothing about the form the interview took. Two weeks later, in response to Hammer's request for clarification, Warden Lappin replies "You are hereby ordered not to provide any information concerning other inmates during news media interviews, social calls, *or correspondence with the media*." (Plaintiff's Appendix at A172; emphasis added.)

At oral argument before this court, counsel for the governmental defendants did not endorse the narrow rule that the majority has postulated. To the contrary, counsel said that *all* mail sent by inmates in the Special Confinement Unit (where Hammer is incarcerated) must be given to prison officials unsealed for inspection before it is mailed. Although this might seem to conflict with PS 5265.11(17)(a), which provides that properly identified and labeled correspondence from an inmate not on restricted mail status to qualifying representatives of the news media "shall be sealed and forwarded without inspection, directly and promptly," that rule is not unqualified. Most importantly, mail from inmates on restricted special mail status is subject to inspection,

and PS 5265.11(17) is expressly made subject to the Program Statement on News Media Contacts—that is, to PS 1480.05. The record does not establish whether Hammer was on restricted mail status, but it indicates that he may have been. (It would not surprise me if everyone in the Special Confinement Unit were subject to additional restrictions.) Furthermore, it is still necessary to reconcile 28 C.F.R. § 540.61(d), PS 5265.11(17), and PS 1480.05(7)(d). It seems most consistent with all of these materials (and consistent with both Warden Lappin's interpretation and the government's representation) to conclude that if a prisoner wrote a letter to a representative of the media that conveyed information about a fellow inmate, the letter would be confiscated. Without the linchpin provided by its assumption that correspondence is free, the majority's rationale collapses.

This brings me to my second point—again one that Judge Rovner has also emphasized: Hammer was blocked completely from developing a record at the summary judgment stage. The government moved for summary judgment before the close of discovery and then refused to comply with Hammer's requests. This left Hammer with little or nothing on which to rely when he attempted to oppose the summary judgment motion. The majority here sets up a straw man, claiming that the only thing that would suffice would be direct depositions of former Attorney General John Ashcroft, former Director of the BOP Kathleen Hawk-Sawyer, and former Warden of the U.S. Penitentiary at Terre Haute Harley Lappin, in

which Hammer tried to unmask their "true" reason for the new rules. The majority is worried that such untrammeled discovery would be inconsistent with *United States v. Morgan*, 313 U.S. 409 (1941), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990). Its concerns are misplaced. First, it is a mistake to lump all three defendants into the same group. As the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), underscores, it is one thing to acknowledge that a high official has knowledge of a particular policy, or even approves of it personally; it is quite another to plead that the official was personally responsible for a violation of constitutional rights. Here, the record already includes the public statements—reproduced *ante* at 8-9—that former Attorney General Ashcroft made about the media ban. In my opinion, the district court could easily respect the policies animating *Morgan* and *LTV* simply by limiting to publicly available information (including whatever falls within the scope of the Freedom of Information Act) any further exploration of the Attorney General's position.

It is by no means unprecedented to seek the deposition of the Director of the BOP or the warden of a particular prison. Once again, the district court would be in a position to decide whether such a measure was necessary, or if alternatives (including production of documents or answers to interrogatories; perhaps even depositions upon written questions) would suffice. Hammer has a right to explore whether the media ban was based

upon legitimate penological concerns—in which case it is legal under the well-established standards of *Turner v. Safley*, 482 U.S. 78, 89 (1987)—or if it was instead designed to stifle speech because the authorities fear that the content will be unwelcome. The latter is, unfortunately, not beyond imagination. It is likely that the military authorities running the infamous Abu Ghraib prison would not have wanted the inmates talking to the media, either about their own experiences or those of their fellow prisoners (some of whom may have been too injured, or too intimidated, to speak for themselves). Closer to home, the sad but true fact is that abuse by prison guards or police has not been entirely abolished. One prisoner might want to write letters that are self-aggrandizing, just as the authorities feared, but another might want to alert the media to the fact that human rights abuses were occurring in a place like the Special Confinement Unit. Censorship of all avenues of communication—which, as I have said, is what this record shows—would be an all-too-effective way to prevent the public from ever learning about such problems.

That leads me to the final point, which is the one that Judge Rovner has emphasized: the First Amendment implications of the media ban. While I certainly agree with her that there is a potential First Amendment problem here, I see this case as a textbook example of the wisdom of the rule of constitutional avoidance. It seems elementary to me that before this court, or any court, should reach an important constitutional question, the record should

be developed properly and we should know what we are talking about. That has not happened in this case. The majority has filled in the gaps with speculation, both about possible loopholes that might make written correspondence an adequate outlet for prisoners despite the media rule, and about possible penological justifications for the rule. This is not the way that we should approach a question as important as the balance between First Amendment rights of prisoners—which *Turner* recognizes are not forfeited entirely—and the critical job of prison officials to ensure security and safety within the prison walls. It is worth noting, however, that neither *Pell* nor *Washington Post* approved a total ban on contact with the media. To the contrary, *Pell* relied on the existence of "alternative methods of communication that are open to prison inmates," 417 U.S. at 504, and *Washington Post* made clear that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there," 417 U.S. at 518. *Washington Post* mentioned specifically the fact that "[o]utgoing correspondence from inmates to press representatives is neither censored nor inspected." *Id.* To the extent that the majority's opinion has swept away the need to show adequate alternative avenues for communication, it has, in my view, overstepped an important boundary that the Court has drawn.

As the original panel opinion did, I would therefore reverse the grant of summary judgment and remand this case to the district court for further proceedings,

along the lines I have outlined here. I therefore respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID PAUL HAMMER,
Plaintiff-Appellant,

v.

JOHN D. ASHCROFT, et al.,
Defendants-Appellees.
No. 06-1750.

Argued Nov. 26, 2007.
Decided Jan. 15, 2008.
Rehearing En Banc Granted,
Opinion Vacated Aug. 19, 2008.*

ROVNER, Circuit Judge.

David Hammer, a federal prisoner on death row, sued various Bureau of Prisons ("BOP") officials alleging that they violated his First Amendment and equal protection rights by implementing and enforcing a policy that prevents him from giving face-to-face interviews with the media and from talking with the media about other inmates. The current defendants-the former Attorney General of the United States, John Ashcroft; a former BOP Director, Kathleen Hawk-Sawyer; and former wardens of the federal prison in Terre Haute, Indiana, Harley Lappin and Keith Olson-moved for

* Judges Flaum, Williams and Tinder did not participate.

summary judgment, arguing that the challenged policy is rationally related to legitimate penological interests. The district court granted the defendants' motion, and Hammer appeals. Because we conclude that Hammer raised a genuine issue of fact as to whether the defendants' proffered justification for the policy banning face-to-face interviews is pretextual, we reverse and remand.

I. Background

In July 1999 the BOP opened the Special Confinement Unit ("SCU") at the federal prison in Terre Haute, Indiana, to house male inmates sentenced to death by the federal courts. The SCU also houses inmates who are not under a death sentence, but who are considered to be on "administrative detention status." Hammer-who was under a federal death sentence for killing his cellmate-was among the first inmates transferred to the SCU.[1]

Between August and December 1999, Hammer gave three face-to-face interviews with members of the media in the SCU's non-contact visiting area. No

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[1] Hammer's death sentence has been vacated, *see United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005)-a decision the government is challenging in the Third Circuit Court of Appeals, *see Hammer v. United States*, No. 06-9001, 128 S. Ct. 43, 169 L. Ed.2d 41. Although Hammer is no longer under a death sentence, Hammer's counsel informed us during oral argument-and the appellees do not dispute-that he is still housed on death row at the SCU and is still subject to the challenged policy.

security problems arose as a result of these interviews. But in late December 2000, Lappin ordered Hammer not to provide information to members of the media about other inmates. When Hammer asked Lappin for clarification, he stated that Hammer was "prohibited from disclosing to a media representative *any* information about another inmate through any manner of communication (oral, written, etc.)." Just over a month later, the BOP disciplined Hammer for providing information about a fellow death row inmate to a reporter. Lappin did not, however, generally prohibit Hammer from giving face-to-face interviews.

That situation changed a few months later. In March 2000, CBS aired a national broadcast of "60 Minutes" featuring an interview with Timothy McVeigh. At that time McVeigh was housed at the SCU awaiting execution for his role in the 1995 bombing of the Alfred P. Murrah federal building in Oklahoma City. Following this interview, U.S. Senator Byron Dorgan wrote to BOP Director Hawk-Sawyer on March 14, 2000, criticizing the BOP for allowing the McVeigh interview and demanding that the BOP prohibit similar interviews with other death row inmates. The published account of this criticism described Dorgan's view of the value of such interviews:

> The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society, but will also prevent him from further intrusion in our lives through television

interviews and from using those forums to advance his agenda of violence.

Soon thereafter Lappin (then the SCU warden) denied every media request for a face-to-face interview with Hammer. When Hammer filed an administrative grievance to protest these denials, Lappin informed him that the procedures for granting interviews "have evolved" since the SCU opened and that requests for in-person media interviews are evaluated on "a case-by-case basis."

The policy on face-to-face interviews evolved further one month later. On April 12, 2001, Ashcroft and Hawk-Sawyer gave a press conference during which they announced a change from the case-by-case policy to a blanket policy preventing SCU inmates from having face-to-face interviews with members of the media on any subject at any time. The policy allows SCU inmates to speak to the media only by telephone during their ordinary 15-minute daily allotment of telephone time. In announcing this policy, Ashcroft explained that it is designed to prevent murderers from, in his view, altering our culture by glamorizing violence:

> I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access

to the podium of America with the blood of 168 innocent victims.

* * *

I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

Hawk-Sawyer announced that the 15-minute telephone limitation "will become the policy for the [SCU] in general."

Three days after the press conference, Lappin signed Institution Supplement 1480.05A ("the media policy"), which states that "[t]o maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted." To gain permission for a 15-minute telephone interview under the new media policy, members of the press must agree that they will not ask an SCU inmate any questions about other federal or state prisoners. And members of the press must agree not to publish any information that an SCU inmate volunteers about other prisoners. All parties agree that the media policy does not apply to all SCU inmates-it applies only to those SCU inmates who have been sentenced to the death penalty.

Hammer sued the defendants under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), alleging that the media policy's ban on in-person interviews and discussions about other inmates violated his First Amendment and equal protection rights. The district court dismissed the

complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), but we reversed, finding that Hammer's allegations-specifically, that the defendants implemented the media policy to prevent death row inmates from speaking publicly rather than to further security concerns-stated a claim, *see Hammer v. Ashcroft, et al.,* 42 Fed. Appx. 861, 863 (7th Cir. 2002).

After we remanded the case, Hammer moved three times for the court to recruit counsel on his behalf. The district court denied each motion. Hammer also filed three requests for discovery, but instead of responding to those requests, the defendants moved for summary judgment a full month before the close of discovery. Only after filing their summary judgment motion did the defendants respond to Hammer's discovery requests by objecting to them all. Hammer filed a motion for a continuance under Federal Rule of Civil Procedure 56(f), arguing that he needed additional time to procure discovery from the defendants. He also filed a brief opposing the motion for summary judgment. The court entered an order granting the continuance "to the extent that his filings in this action ... shall be deemed to have been timely made," but it denied Hammer any extension of time to conduct further discovery.

In support of the defendants' motion for summary judgment, Lappin submitted a declaration purporting to justify the SCU's media policy. He explained that broadcasting face-to-face interviews of inmates can create "jailhouse celebrities," giving them heightened status among the inmates and

leading to security breaches. He also explained that it was necessary to restrict inmates from discussing other inmates with the media to prevent privacy breaches or "real or imagined slights, insults or provocations" that could inflame tensions in the SCU. In his response, Hammer argued that Lappin's articulated security rationale for the ban on face-to-face interviews was "a guise" to cover up "the real reason" behind the ban-anger over the McVeigh interview and the resulting outrage over death row inmates speaking to a national audience. The court granted the defendants' motion for summary judgment, stating that the media policy is reasonably related to legitimate penological interests.

II. Analysis

On appeal Hammer argues that the SCU's media policy preventing death row inmates from giving face-to-face interviews with the media violates his equal protection, First Amendment, and procedural due process rights. Specifically, he argues that the media policy treats death row inmates differently from all other federal inmates based on an untested assumption that giving death row inmates access to the media poses a categorically heightened security risk. Hammer also asserts that he submitted evidence sufficient to show that the media policy was passed for the impermissible reason of preventing death row inmates from speaking publicly, and not to further security interests. He also argues that the manner in which the BOP adopted the media policy deprived him of due process. Finally, Hammer challenges the district court's denial of his three

motions for counsel and his Rule 56(f) motion for a continuance.

A. Constitutional Claims

We review *de novo* the district court's grant of summary judgment for the defendants on Hammer's constitutional challenges to the media policy. *See Steen v. Myers,* 486 F.3d 1017, 1021 (7th Cir. 2007). Inmates retain constitutional rights that are consistent with incarceration; those rights include access to the media. *See Turner v. Safley,* 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Pell v. Procunier,* 417 U.S. 817, 827-28, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). But recognizing the deference owed to the administrative judgment of prison officials, the Supreme Court has held that a prison regulation infringing on an inmate's constitutional rights is valid if "it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89, 107 S. Ct. 2254. Accordingly, a prison regulation that restricts an inmate's access to the media will be upheld if there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (quotation marks omitted). Other relevant factors include whether the regulation leaves open alternative means of exercising the right; the impact accommodation would have on other inmates, guards, and prison resources; and whether there are obvious, easy alternatives to the restriction. *Id.* at 89-90, 107 S. Ct. 2254; *see also Lindell v. Frank,* 377 F.3d 655, 657 (7th Cir. 2004).

Hammer argues that we should apply strict scrutiny to his equal protection claim, rather than the *Turner* analysis, because he maintains that *Turner* applies only to policies that affect all inmates within a prison equally or that apply temporarily to individual inmates in response to a disciplinary infraction. Hammer argues that strict scrutiny should apply here because the media policy arbitrarily deprives death row inmates of First Amendment freedoms that other federal prisoners enjoy-namely, face-to-face media access. But the Supreme Court has held that the *Turner* analysis "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper,* 494 U.S. 210, 224, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990); *see also Russell v. Richards,* 384 F.3d 444, 447 (7th Cir. 2004). Post-*Turner,* the Supreme Court applies strict scrutiny only to prison regulations involving suspect classifications such as race. *See, e.g., Johnson v. California,* 543 U.S. 499, 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005). Federal inmates on death row are not a suspect class. *Cf. Pryor v. Brennan,* 914 F.2d 921, 923 (7th Cir. 1990). Accordingly, courts have declined to apply heightened scrutiny in cases involving equal protection challenges to prison regulations that implicate First Amendment rights, *see, e.g., Williams v. Lane,* 851 F.2d 867, 881 (7th Cir. 1988); *Taylor v. Johnson,* 257 F.3d 470, 474 (5th Cir. 2001); *Morrison v. Garraghty,* 239 F.3d 648, 654-55 (4th Cir. 2001), even where the regulations distinguish among groups of inmates within a prison, *see DeHart v. Horn,* 227 F.3d 47, 61 (3d Cir. 2000);

Benjamin v. Coughlin, 905 F.2d 571, 575 (2d Cir. 1990). Thus we view Hammer's equal protection and First Amendment claims through the *Turner* lens.

Turning then to the first prong of the *Turner* analysis and Hammer's First Amendment claim, we ask whether a valid, rational connection exists between the media ban on face-to-face interviews and the cited security interest. *See Turner,* 482 U.S. at 89, 107 S. Ct. 2254. No such connection exists if the purpose of the policy is to suppress the content of the restricted message. *See id.* at 90, 107 S. Ct. 2254. And the penological interest that the prison officials invoke in court to justify the restriction must have actually motivated them at the time they enacted or enforced the restriction; the invoked interests fail under *Turner* if they are a pretext for an illegitimate, content-specific motivation. *See Salahuddin v. Goord,* 467 F.3d 263, 276-77 (2d Cir. 2006) (holding that prison officials must show that they "actually had, not just could have had, a legitimate reason for burdening protected activity" to survive summary judgment); *Abu-Jamal v. Price,* 154 F.3d 128, 134 (3d Cir. 1998) (noting that a prison rule is "not content neutral as required by *Turner*" if it is enforced at least in part due to public pressure rather than security concerns); *Quinn v. Nix,* 983 F.2d 115, 118 (8th Cir. 1993) (stating that "[p]rison officials are not entitled to the deference described in *Turner* ... if their actions are not actually motivated by legitimate penological interests at the time they act."); *Walker v. Sumner,* 917 F.2d 382, 386-87 (9th Cir. 1990) (holding that where a prisoner alleges that a policy is enforced for a "dubious purpose" officials

must demonstrate that the asserted penological interests "are the actual bases for their policies"); *Baraldini v. Thornburgh*, 884 F.2d 615, 620 (D.C. Cir. 1989) (noting that "[a] reviewing court must always be careful to make certain that prison administrators are not pretextually using alleged concerns in order to punish an inmate for his or her political or other views.").

Here, Hammer submitted evidence suggesting that the driving force behind the ban on face-to-face interviews was not a security concern, but rather outrage over McVeigh's message and a desire to prevent other death row inmates from expressing their views about themselves or their fates and thereby influencing "our culture." For example, without any concerns about security breaches Lappin allowed Hammer face-to-face media interviews until the McVeigh interview aired; after that (and after a senator's written protest to the BOP about such broadcasts) Lappin denied all media requests for face-to-face interviews with Hammer. Most significantly, in unveiling the blanket restriction on face-to-face interviews with death row inmates, Ashcroft-with Hawk-Sawyer at his side-explained that he wanted to deny such inmates a platform from which they could spread their "irresponsible glamorization of a culture of violence." This is evidence from which a jury could conclude that when Ashcroft's subordinate Lappin implemented the restriction at the SCU just three days later, the defendants desired to control a disfavored message rather than to secure the SCU.

The defendants argue that this evidence amounts to nothing more than "a coincidence of timing." But the evidence is more than just timing. Ashcroft explained that his distaste for the content of interviews given by death row inmates was the reason for the policy. That is direct evidence of the actual motivation, and it creates a genuine issue of material fact as to whether Lappin was motivated by a desire to prohibit a disagreeable viewpoint or to advance prison security.

The defendants also argue that we must defer to Lappin's judgment that the challenged policy is needed to combat the problem of jailhouse celebrities. But in reviewing a grant of summary judgment we must be careful to distinguish between matters of prison administration-on which we give substantial deference to prison officials' professional judgment-and matters of disputed fact on issues like motivation-on which we draw inferences in favor of the non-moving party. *See Beard v. Banks,* 548 U.S. 521, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006). If an inmate submits evidence showing that the penological interests invoked by prison authorities are pretextual, the policy is not neutral and fails under *Turner. See Abu-Jamal,* 154 F.3d at 134. Hammer submitted evidence from which a reasonable jury could conclude that the media policy was implemented and is now enforced not because of safety concerns, but rather in response to public pressure to prevent death row inmates from voicing their views publicly. Accordingly, summary judgment is inappropriate on Hammer's First Amendment challenge to the ban on face-to-face

interviews based on the first *Turner* factor. *See Salahuddin,* 467 F.3d at 276-77.

Summary judgment on the First Amendment claim was also inappropriate as to two other *Turner* factors because Hammer has cast doubt on whether the media policy leaves open sufficient alternate routes of access to the media and whether there are reasonable alternatives to the ban on face-to-face interviews. *See Turner,* 482 U.S. at 90, 107 S. Ct. 2254. For example, Lappin's justification for the ban on face-to-face interviews is that the *broadcast* of inmate interviews creates the risk of jailhouse celebrity. The government has not explained why, then, the prison needs to ban face-to-face interviews that are not recorded or broadcast. Moreover, there is a question of material fact whether the ban on discussing other inmates with the media allows Hammer an alternate route for discussing his criminal case. Hammer's goal is to discuss his criminal case (which involves inmate witnesses) with members of the press to highlight his disagreement with the prosecution. But he is subject to discipline if he engages in those discussions. Thus there is a question of material fact as to whether the policy leaves open *any* meaningful way for Hammer to access the media to discuss his case. *Cf. Pell,* 417 U.S. at 827-28, 94 S. Ct. 2800.

Turning to Hammer's equal protection claim, we note that the district court gave this claim short shrift, stating only that the media policy applies equally to all inmates housed in the SCU. But this ignores Hammer's evidence that the media policy applies only to SCU inmates under a death sentence,

a fact that the defendants do not dispute on appeal. And Hammer's evidence of pretext also casts doubt on whether the defendants had a valid interest in treating death row inmates differently from all other federal inmates. The equal protection clause prohibits the government from making distinctions among groups of speakers based on the content of their speech. *See, e.g., Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Here, Ashcroft said that his concern about the "glamorization of violence" in American culture shaped the BOP's approach to the SCU-specific ban on death row inmates giving face-to-face interviews. A reasonable jury could thus conclude that death row inmates are treated differently not because they are disproportionately likely to become jailhouse celebrities or inflame tensions with other inmates, but because the policy makers believed that death row inmates are disproportionately likely to promote a "glamorization of violence." Accordingly, the defendants are not entitled to summary judgment on Hammer's equal protection claim.

The district court did not address what Hammer now argues is a claim that the defendants violated his due process rights by adopting the media policy without offering him notice or the opportunity to comment. But the court did not address this claim because Hammer did not make it; nothing in his complaint or opposition to summary judgment would have put the defendants or the court on notice that he objected to the process through which the policy was adopted. Because Hammer's purported due process claim is outside the scope of the court's grant

of summary judgment for the defendants, we need not address it here.

We note that it can be an easy thing for an inmate to allege that prison officials are lying about the rationale behind a prison restriction; it is only because Hammer has backed up his allegations with admissible evidence from which a reasonable jury could infer that an illegitimate reason lies behind the interview ban that his First Amendment and equal protection claims survive summary judgment.

B. Personal Involvement

The district court granted summary judgment for Ashcroft and Hawk-Sawyer because, in its view, they had no personal involvement in the events underlying the allegations. A supervisory defendant is personally involved in and liable for a constitutional violation if he "create[s] a custom or policy fostering the violation or allow[s] the custom or policy to continue after learning of it." *Thomas v. Ashcroft,* 470 F.3d 491, 496-97 (2d Cir. 2006). Ashcroft's and Hawk-Sawyer's participation in the press conference in which they called for the BOP ban on face-to-face interviews raises a triable issue of whether they fostered the ban for the purpose of suppressing expression. *See Whitford v. Boglino,* 63 F.3d 527, 531 (7th Cir. 1995). Thus summary judgment on the basis of their non-involvement was unwarranted.

Before addressing Hammer's procedural challenges to the district court's decision, we note two issues that the district court may address on remand. Hammer has sued the defendants in their

individual and official capacities for damages, and for injunctive and declaratory relief. The defendants may be entitled to qualified immunity from damages, but given the unresolved issues of fact, we leave that determination to the district court in the first instance. Hammer's claim for injunctive relief against the defendants in their individual capacities is now moot because none of the defendants currently hold the positions in which they were sued. But pursuant to Federal Rule of Appellate Procedure 43(c)(2) and Federal Rule of Civil Procedure 25(d), the district court should substitute the current officeholders for the official-capacity claims and consider which of them are proper defendants for injunctive relief under *Ex Parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (requiring a "special relation" between the public official sued and the challenged rule).

C. Denial of Motions for Counsel and for a Continuance

Hammer also argues that the district court erroneously denied his three motions to recruit counsel and his Rule 56(f) motion for a continuance. We review the district court's rulings on these motions for abuse of discretion. *See Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006); *Davis v. G.N. Mort. Co.*, 396 F.3d 869, 885 (7th Cir. 2005). In resolving a motion for the recruitment of counsel, the district court must consider both the complexity of the case and the *pro se* plaintiff's ability to litigate it himself. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). The court must analyze the plaintiff's capabilities in light of the challenges specific to his

case, including "the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." *Id.* at 655. In reviewing a court's decision to deny a motion for counsel, we must ensure that the court meaningfully engaged in the correct analysis, and did not render a decision arbitrarily. *Id.* at 658, 660.

Here, the district court's three orders denying Hammer's requests for counsel do not demonstrate that the court meaningfully considered the complexity of Hammer's claims. Its first order is silent regarding the difficulty of his case. The second two orders state that Hammer "has demonstrated familiarity with his claims and the ability to present them, because the issues presented by his claims are not complex, and because this does not appear to be a case in which the presence of counsel would make a difference in the outcome." But this is nothing more than a restatement of the applicable legal standard, without any reasoning showing that the court actually considered the standard in light of the particulars of Hammer's case. *See id.* at 660.

But we will reverse the district court's decision to deny counsel only on a showing of prejudice, *see id.* at 659, which leads us to Hammer's Rule 56(f) motion for a continuance. Hammer asked for more time to conduct discovery because the defendants moved for summary judgment before the close of discovery and then objected to all of his discovery requests. Because Hammer filed his opposition to summary judgment before the court ruled on his motion, it concluded that he did not need further

time for discovery. But the fact that Hammer filed his response before waiting to see if the court would grant the continuance shows only that he made the best of what he had, not that he had a fair opportunity to avail himself of discovery. And nothing in the court's order denying the continuance suggests that it considered the impact that the defendants' premature summary judgment motion had on Hammer's ability to obtain the discovery necessary to defend against the motion.

The appellees now defend the district court's denial of the continuance on the ground that Hammer did not specify what documents he needed time to procure. But that is precisely the kind of failure that could have been cured had the court granted his motion for counsel. The appellees cannot have it both ways-they cannot argue that Hammer has the ability to litigate his own claims and then fault him when he fails to do so with the sophistication of an attorney. We thus conclude that the denial of counsel prejudiced Hammer, and, especially in light of Hammer's *pro se* status, that the court abused its discretion in denying his Rule 56(f) motion for a continuance.

For the reasons set forth above, the district court's decision is REVERSED and REMANDED for further proceedings.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

DAVID PAUL HAMMER,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Defendants.

No. IP 01-558-C-T/G.

Feb. 23, 2006.

TINDER, J.

This cause is before the court on the amended complaint of plaintiff David Paul Hammer, on the defendants' answer, and on the defendants' motion for summary judgment.

Whereupon the court, having considered the pleadings, the motion for summary judgment, the response thereto and the defendants' reply, and being duly advised, now finds that the motion for summary judgment must be granted. This conclusion rests on the following facts and circumstances:

1. As used in this Entry, "Hammer" refers to the plaintiff, David Paul Hammer, "USPTH" refers to the United States Penitentiary at Terre Haute, Indiana, "BOP" refers to the Federal Bureau of Prisons, "Attorney General Ashcroft" refers to former

United States Attorney General John Ashcroft, "Director Lappin" or "Warden Lappin" refers to BOP Director Harley Lappin, "Director Sawyer-Hawk" refers to former BOP Director Kathleen Sawyer-Hawk, and "Warden Olson" refers to USPTH Warden Keith Olson.

2. As noted, the defendants seek resolution of Hammer's claims through the entry of summary judgment.

> a. The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note to 1963 Amendment of FED. R. CIV. P. 56(e) (quoted in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). "Summary Judgment is not appropriate 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party'." In a motion for summary judgment, the court "may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (citations omitted). "Rather, '[t]he court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.'" *Id.* (quoting *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994)). If a reasonable jury could return a

verdict in favor the nonmovant, summary judgment should not be granted. *Id.* (citation omitted).

b. A court will grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Scott v. Edinburg,* 346 F.3d 752, 755 (7th Cir. 2003) (quoting FED. R. CIV. P. 56(c) and citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The court must "construe all facts in a light most favorable to ... the party opposing summary judgment, and ... draw all reasonable inferences in his favor." *McGreal v. Ostrov,* 368 F.3d 657, 672 (7th Cir. 2004) (citation omitted). "'In the light most favorable' simply means that summary judgment is not appropriate if the court must make 'a choice of inferences.'" *Draghi v. County of Cook,* 184 F.3d 689, 691 (7th Cir. 1999) (quoting *Smith v. Severn,* 129 F.3d 419, 425 (7th Cir. 1997)). However, the nonmoving party bears the burden of coming forward with specific facts from the record which show a genuine issue of material fact. *Morfin v. City of E. Chi.,* 349 F.3d 989, 997 (7th Cir. 2003) (citation omitted). "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be

entered." *Liberles v. County of Cook*, 709 F.3d 1122, 1126 (7th Cir. 1983).

3. "Relief from misconduct by federal agents may be obtained either by a suit against the agent for a constitutional tort under the theory set forth in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), or by a suit against the United States under the Federal Tort Claims Act [FTCA] ... which permits claims based upon misconduct which is tortious under state law. 28 U.S.C. §§ 1346(6), 2680." *Sisk v. United States,* 756 F.2d 497, 500 n.4 (7th Cir. 1985). Hammer has chosen the Bivens route.

a. Claims asserted under a Bivens theory are brought pursuant to subject matter jurisdiction conferred by 28 U.S.C. § 1331, which provides that "[t]he District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

b. A prerequisite to maintaining an action under § 1331 is that the plaintiff "must allege a violation of the United States Constitution or a federal statute." *Goulding v. Feinglass,* 811 F.2d 1099, 1102 (7th Cir. 1987), *cert. denied*, 482 U.S. 929, 107 S. Ct. 3215, 96 L. Ed. 2d 701 (1987).

c. Bivens "authorizes the filing of constitutional tort suits against federal officers in much the same way that 42 U.S.C. § 1983 authorizes such suits against

state officers." *King v. Federal Bureau of Prisons,* 415 F.3d 634, 636 (7th Cir. 2005). Thus, one feature of a Bivens action is that the plaintiff must allege that the individual defendants were personally involved in the violation of his constitutional rights. *See Barbera v. Smith,* 836 F.2d 96, 99 (2d Cir. 1987), *cert. denied sub nom. Barbera v. Schlessinger,* 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d 808 (1989).

4. Hammer's claims which survive prior rulings and certain voluntary dismissals are that the defendants violated his First Amendment rights by denying and restricting his access to the news media based on the content of his message and his status as a federal death-row inmate. He alleges that between March 2000 and April 2001 a number of news organizations wished to conduct face-to-face or video-conference interviews with him, but that Warden Lappin denied every one of his requests to participate in the interviews. In addition, Hammer alleges that Warden Lappin unconstitutionally restricted Hammer's ability to communicate with the media via telephone or mail correspondence. Hammer seeks compensatory and punitive damages and injunctive relief.

5. Several general principles guide the court's consideration of the free speech and association claims presented. Among these principles are those on which the Court of Appeals relied in finding that the dismissal of the present action pursuant to 28 U.S.C. § 1915A(b) was premature. *Hammer v.*

Ashcroft, 2002 WL 1732580 (7th Cir. 2002) (unpublished).

a. Lawful "incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (citing *Price v. Johnston,* 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948)).

b. Nonetheless, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

c. Inmates retain First Amendment rights that are consistent with incarceration, and prison restrictions limiting or interfering with those rights must reasonably relate to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Rowe v. Shake,* 196 F.3d 778, 782 (7th Cir. 1999).

d. While inmates' free-speech rights include access to the media, inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content. *See Pell v. Procunier,* 417 U.S. 817, 827-28 (1974);

Rowe, 196 F.3d at 782; *Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir.1998). Prison officials are given deference in establishing regulations and in determining appropriate restrictions, and a court will not second-guess regulations or practices that serve legitimate penological interests. *Turner*, 482 U.S. at 89. Additionally, as an incident of their incarceration, prisoners lack the same freedom to criticize they would enjoy on the outside. *Gibbs v. King*, 779 F.2d 1040 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S. Ct. 1975, 90 L. Ed. 2d 659 (1986).

e. The Supreme Court has delineated four factors for determining whether a specific regulation or practice serves a legitimate penological interest. *Turner*, 482 U.S. at 89-90. The primary factor is whether a valid, rational connection exists between the restriction and a legitimate interest. *Id.* A restriction on speech that fails to meet this connection fails under *Turner*. *See Shaw v. Murphy*, 532 U.S. 223, 229-30, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). The other factors relevant in determining a restriction's reasonableness include whether the inmate has alternative means of exercising the right; the impact accommodation of the asserted right would have on guards, other inmates, and prison resources; and the absence of a reasonable alternative to the regulation or practice. *Turner*, 482 U.S. at 90.

f. In determining whether a prison regulation is "'reasonably related to legitimate penological interests,'" a prisoner "must overcome the presumption that the prison officials acted within their 'broad discretion.'" *Shaw v. Murphy,* 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). "The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 532 U.S. 126, 132 (2003).

6. As to each of the various specifications of improper action, whether it be the promulgation or implementation of BOP policies or actions assertedly taken outside the bounds of such policies, Attorney General Ashcroft and Director Hawk-Sawyer were not personally involved. The consequence of this is that these defendants are not liable to Hammer for any of those actions and they are entitled to the entry of summary judgment as to the claims against them.

7. Warden Lappin was Warden of the USPTH from October 25, 1998, until July of 2001. As Warden, Lappin had overall responsibility of all functions of the institution and in that role he planned, directed and coordinated institution programs covering a broad range of diverse issues related to complex institution safety and security requirements. Warden Olson was Warden of the USPTH from August 26, 2001, until September 30, 2004.

8. On July 13, 1999, the Special Confinement Unit ("SCU") was activated at the USPTH. The SCU is the assigned housing unit for male prisoners under federal sentences of death. While at the USPTH, Hammer has been assigned to the SCU.

9. The BOP promulgates Program Statements that contain the internal operating policies and procedures of the Bureau in order to provide direction to Bureau personnel in the operation of the federal prison systems. Following the activation of the SCU, numerous institution supplements were reviewed to ascertain if modifications were needed to specifically address the special and unique needs of the SCU. An institution supplement is a statement of procedure which is required in order to given direction to operations of a BOP facility because of local conditions. Institution supplements are reviewed by institution staff and signed by the Warden. Because the USPTH is the only federal facility with such a unit, these policies are specific to the USPTH. Management of the SCU at the USPTH requires consideration of factors not present, or not present to the same degree, in other housing units of the USPTH or other units of other prisons operated by the BOP. The SCU is unique, as is its inmate population. In considering the supplement to Program Statement 1480.05, prison personnel (including Warden Lappin) intended to balance the interests of the inmate and the journalist along with the interests of the BOP with respect to its responsibility of maintaining security and good order at the institution. Additionally, it was the intent of those involved with implementing the Supplement to

safeguard the safety and the rights (including privacy rights) of institution staff and of the inmate population. These were legitimate concerns in the specific environment which was being administered. There was the potential for inmates to be perceived as "jail celebrities," which could disrupt the orderly operation of the prison by undermining prison security. Additionally, the right of privacy of other inmates was a consideration. In a correctional setting, slights, insults or provocations, real or imagined, can result in inmate-on-inmate violence and thus can have dire consequences for inmates, penitentiary staff, and the public at large. The result of this effort was the adoption of Institution Supplement THA 1480.05A. [1]

The procedures implemented as the result of these concerns were determined to be the least restrictive method of protecting the various interests involved-the interest of the individual inmate, the interests of the inmate as a whole, and the interests of the public as a whole. Although Institution Supplement THA 1480.05A restricts Hammer's access to face-to-face interviews with members of the media, it does so in a manner fully in accord with the standard established in *Turner*. That is, the restriction contained in Institution Supplement THA 1480.05A is reasonably related to legitimate penological interests. Hammer has not shown

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[1] Institution Supplement THA 1480.05A was replaced with Institution Supplement THA 1480.05B in January 2003. For the purpose of the present record, no substantive changes were made to the section addressing media interviews for SCU inmates.

otherwise, even though it is his burden to do so, *Overton v. Bazzetta*, 532 U.S. 126, 132 (2003), and the evidentiary record shows in every respect that the regulation adopted by Warden Lappin via Institution Supplement THA 1480.05A withstands Hammer's constitutional challenge. Not only is the restriction reasonably related to legitimate penological interests, but the restriction is applied in a neutral manner without regard to content. The restriction is applied equally among inmates housed in the SCU. Hammer and other inmates assigned to the SCU may contact media representatives through general and special mail, as well as through monitored and unmonitored telephone calls, giving these inmates an alternative means of exercising the right. Accommodating the unfettered right Hammer asserts would have a disruptive impact on the operation of the prison. Institution Supplement THA 1480.05A sets forth restrictions on inmate content with the media only in areas reasonably deemed proper for the purpose of operating the prison. Although Warden Lappin denied several requests by media representatives for personal interviews with Hammer, Hammer and other inmates assigned to the SCU have meaningful access to the media, and Institution Supplement THA 1480.05A does not infringe on the constitutional guarantee of that access. *See Johnson v. Stephan,* 6 F.3d 691, 692 (10th Cir. 1993) (prisoner's First Amendment rights not violated when prison officials denied face-to-face interview with prisoner since alternative means of communication were available); *Mitford v. Pickett,* 363 F. Supp. 975, 978 (E.D. Ill. 1973) (prison regulations limiting personal interviews of inmates

by the press is an internal affair of prison and does not violate the First Amendment where inmates and the press have ample opportunity to communicate by mail). The fact that Hammer does not assess his own history of communication with the media as anything other than benign is not significant, *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("[t]he object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"), just as the fact that the restrictions imposed in Institution Supplement THA 1480.05A were not always in place is not significant, for inmates acquire no interest in unchanging conditions of their confinement. *Meachum v. Fano,* 427 U.S. 215, 225, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (transfer of inmates to prison with more burdensome conditions of confinement not a violation of due process). The Supreme Court has stated that content-based speech restrictions are "neutral" so long as distinctions are drawn "solely on the basis of their potential implications for prison security." *Thornburgh v. Abbott,* 490 U.S. 401, 415-16, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). Thus, while the government here is proscribing the content of the speech of SCU inmates, this is "neutral" for purposes of this analysis. *See also Giano v. Senkowski,* 54 F.3d 1050, 1055 (2d Cir. 1995) (discussing neutrality under *Turner*).

10. Warden Olson was not involved in the drafting or implementation of Institution Supplement 1480.05A in any respect. He did approve the replacement document in January 2003,

this being Institution Supplement THA 1480.05B. As noted, however, no substantive changes were made to the section addressing media interviews for SCU inmates.

11. Hammer's case is built around the view that he is entitled to participate in interviews without regard to the management and control of the SCU. This ignores the realities of the SCU, the reason for its existence, and the legitimate-even the paramount-interests of prison authorities in carrying out the difficult task of operating the SCU.[2] This task warrants deference from the courts, which must be sensitive to their expert judgment and mindful that the judiciary is "'ill equipped' to deal with the difficult and delicate problems of prison management." *Thornburgh v. Abbott,* 490 U.S. 401, 407-08, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). At the same time, that deference "must be schooled, not absolute." *Campbell v. Miller,* 787 F.2d 217, 227 n.17 (7th Cir.), cert. denied, 479 U.S. 1019, 107 S. Ct. 673, 93 L. Ed. 2d 724 (1986). The fact that initial responsibility for the prison is vested in prison administrators "does not mean that constitutional rights are not to be scrupulously observed." Bell, 441 U.S. at 562. For the reasons explained above, prison authorities-including the defendants-have not overstepped the constitutional limits, and the regulation they have crafted is not, as Hammer characterizes it, a simple limit on speech they would find offensive. In the specific environment in which

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[2] As Hammer himself concedes, he is on death row for having murdered a fellow inmate at a federal prison in Pennsylvania.

Hammer finds himself, the regulation is a compelling adjunct to the sound management of the SCU-amply passing the constitutional challenge pressed in this case. *See, e.g., Hewitt v. Helms,* 459 U.S. 460, 473, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) ("[t]he safety of the institution's guards and inmates is perhaps the fundamental responsibility of the prison administration"); *Pell v. Procunier,* 417 U.S. 817, 823, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (security is "central to all other corrections goals").

12. Claims such as those presented in this case must be considered in light of the special environment of a prison, where administrators "must be accorded wide-ranging deference in the ... execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier,* 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). Nonetheless, "[f]ederal courts must take cognizance of the valid constitutional claims of prison inmates." *Babcock v. White,* 102 F.3d 267, 275 (7th Cir. 1996) (quoting *Turner v. Safley,* 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). Hammer has not identified a genuine issue of material fact as to his claims against the defendants. Their motion for summary judgment is therefore granted.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID PAUL HAMMER,
Plaintiff-Appellant,

v.

JOHN D. ASHCROFT,
Attorney General of the United States, et al.,
Defendants-Appellees.

No. 01-2898.
Submitted July 24, 2002.[1]
Decided July 25, 2002.

Before BAUER, RIPPLE, MANION, Circuit Judges.

ORDER

Federal death-row inmate David Paul Hammer brought this lawsuit under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), alleging that the defendants violated his First Amendment rights by denying and restricting his access to the

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[1] Appellees notified this court that they were never served with process in the district court and would not be participating in this appeal, which has been submitted without a brief from them. After examining the appellant's brief and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the appellant's brief and the record.

news media. The defendants are Attorney General John D. Ashcroft, Warden Harley G. Lappin, and Federal Bureau of Prisons Director Kathleen Hawk-Sawyer. The district court screened the complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), and dismissed it for failure to state a claim. Mr. Hammer appeals, and, for the reasons explained below, we reverse and remand.

Mr. Hammer is incarcerated in the Federal Death Row Unit at the United States Penitentiary in Terre Haute, Indiana. In April 2001 Mr. Hammer filed this lawsuit, alleging that since March 2000 the defendants have unconstitutionally infringed on his right to freedom of speech by denying and restricting his access to the news media based on the content of his message and his status as a federal death-row inmate. In his complaint, Mr. Hammer alleged that between March 2000 and April 2001 a number of news organizations wished to conduct face-to-face or video-conference interviews with him, but that Warden Lappin denied every one of his requests to participate in the interviews. In addition, Mr. Hammer alleged that the Warden Lappin unconstitutionally restricted his ability to communicate with the media via telephone or mail correspondence.

According to Mr. Hammer, these restrictions limiting his access to the media are part of the defendants' deliberate plan to deny him a public forum and are in response to "public outcry" over a television interview conducted in March 2000 of federal death-row inmate Timothy McVeigh. Mr. Hammer further alleged that the reasons prison

officials provided for restricting his speech and denying his requests-namely, safety and privacy concerns-are not the real reasons they are restricting his speech. He contended that the prison's purported reasons are a "guise." He claimed that prison officials are restricting his speech because he is a death-row inmate and they want to prevent his views from being publicized. In particular, he alleged, they seek to suppress his views about capital punishment and his experience on federal death row. Mr. Hammer also alleged that before March 2000 he was allowed to participate in a number of interviews without causing any disruptions or prompting safety concerns.

In May 2001 the district court dismissed Mr. Hammer's complaint under § 1915A for failure to state a claim. The district court concluded that Mr. Hammer failed to state a claim because he had no constitutional right to face-to-face interviews, and because the restrictions on his access to the media served legitimate penological interests of safety, privacy, and order.

We review de novo a district court's dismissal under § 1915A for failure to state a claim. *Wynn v. Southward,* 251 F.3d 588, 591 (7th Cir. 2001). We apply the same standard as for dismissals under Rule 12(b)(6): we take all well-pleaded allegations in the complaint as true and draw reasonable inferences in the plaintiff's favor. *Id.* at 592; *Zimmerman v. Tribble,* 226 F.3d 568, 571 (7th Cir. 2000). A complaint fails to state a claim only if relief could not be granted under any set of facts consistent with the allegations. *Wynn,* 251 F.3d at 592.

Inmates retain First Amendment rights that are consistent with incarceration, and prison restrictions limiting or interfering with those rights must reasonably relate to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Rowe v. Shake,* 196 F.3d 778, 782 (7th Cir. 1999). While inmates' free-speech rights include access to the media, inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content . *See Pell v. Procunier,* 417 U.S. 817, 827-28, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). Prison officials are given deference in establishing regulations and in determining appropriate restrictions, and we will not second-guess regulations or practices that serve legitimate penological interests. *Turner,* 482 U.S. at 89.

The Supreme Court has delineated four factors for determining whether a specific regulation or practice serves a legitimate penological interest. *Id.* at 89-90. The primary factor is whether a valid, rational connection exists between the restriction and a legitimate interest. *Id.* A restriction on speech that fails to meet this connection fails under *Turner. See Shaw v. Murphy,* 532 U.S. 223, 229-30, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). Relevant to this factor is whether the restriction on speech is applied in a neutral manner without regard to content and is applied equally among inmates. *Turner,* 482 U.S. at 90; *Rowe,* 196 F.3d at 782; *Abu-Jamal v. Price,* 154 F.3d 128, 134 (3d Cir. 1998). The other factors

relevant in determining a restriction's reasonableness include whether the inmate has alternative means of exercising the right; the impact accommodation of the asserted right would have on guards, other inmates, and prison resources; and the absence of a reasonable alternative to the regulation or practice. *Turner,* 482 U.S. at 90.

Given these standards, Mr. Hammer's complaint stated a claim. In regard to whether the restrictions on his speech have a valid, rational connection to a legitimate interest, Mr. Hammer specifically alleged that the defendants are restricting his speech based on his status as a death-row inmate and to suppress his views, and, despite their assertions to the contrary, not to serve legitimate interests. In addition, he alleged that the prison is not applying the restrictions in a neutral fashion, but is instead using the guise of unspecified security concerns to restrict his speech based on status and content. In regard to whether alternative avenues are open to him, Mr. Hammer alleged that the prison not only restricts his access to face-to-face interviews, but also unconstitutionally restricts his access via telephone and mail correspondence. He also alleged that the prison is already equipped for video-conferencing and that this would provide a readily available alternative to face-to-face interviews. In regard to the impact that accommodating his rights would have on the prison, Mr Hammer alleged that prior to March 2000 he participated in a number of interviews and that these interviews did not create any disruptions or security concerns. Finally, Mr. Hammer also alleged that the prison's practice of

ordering him, under threat of reprimand, not to mention any other inmate in any type of communication with the media does not conform to the Bureau of Prison's own regulations.[2] These allegations state a claim. *See Turner,* 482 U.S. at 89-90; *Abu-Jamal,* 154 F.3d at 134 (prison's restrictions directed at content of inmate's writings and in response to public pressure not valid under *Turner*); *see also Antonelli v. Sheahan,* 81 F.3d 1422, 1432 (7th Cir. 1996) (inmate's allegations stated a first amendment claim, and "[a]t this early stage in the litigation, we cannot determine, of course, whether the defendants may be able to justify" their conduct); *Shimer v. Washington,* 100 F.3d 506, 510 (7th Cir. 1996) ("The prison administration must proffer some evidence to support its restriction.").

Rather than taking the allegations in Mr. Hammer's complaint as true, the district court erroneously relied on materials outside the

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[2] On this point, Mr. Hammer alleged that the restrictions the prison placed on him were broader than those provided for in the regulations. Mr. Hammer alleged that in ordering him not to mention any other inmate in his communications with the media, Warden Lappin maintained that the restriction was warranted by Bureau of Prisons Regulation 28 C.F.R. § 540.61(d). The district court also relied on this regulation to conclude that the restrictions placed on Mr. Hammer's speech were warranted. On appeal, Mr. Hammer correctly points out that § 540.61(d) states that, "the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed;" whereas, he alleged that he was ordered not to mention any other inmate under any circumstances, regardless of whether or not the inmate refused to be interviewed.

complaint in order to conclude that it failed to state a claim. *See Covington v. Illinois Sec. Serv., Inc.*, 269 F.3d 863, 864-65 (7th Cir. 2001) (motion to dismiss under Rule 12(b)(6) erroneously granted by relying on attached EEOC letter rather than complaint); *Jacobs v. City of Chicago,* 215 F.3d 758, 766 (7th Cir. 2000). Mr. Hammer had attached several administrative-review documents to his complaint to show that he had exhausted his administrative remedies. 42 U.S.C. § 1997e(a); *Dixon v. Page,* 291 F.3d 485, 488 (7th Cir. 2002). The district court focused on two documents that were responses from Warden Lappin denying two of Mr. Hammer's requests for interviews on the basis of safety and privacy concerns. Instead of accepting Mr. Hammer's allegations that these explanations were a "guise" and not the reasons his speech is being restricted, the district court accepted Warden Lappin's explanations as true: "Warden Lappin's response shows that he considered the very unique environment of the death row unit ... It is clear that Lappin's decision and the supporting regulations are reasonably related to legitimate penological interests." At this early pleading stage, the district court erred by relying on those documents rather than on Mr. Hammer's complaint. *Covington,* 269 F.3d at 865; *Wynn,* 251 F.3d at 593-94; *Jacobs,* 215 F.3d at 766.

To be clear, we express no opinion about the merits of Mr. Hammer's claim, whether the prison's restrictions were justified, or the constitutionality of any regulations. But Mr. Hammer has properly

stated a claim and his complaint should not have been dismissed.

Accordingly, we REVERSE and REMAND to the district court for further proceedings.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID PAUL HAMMER,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Defendants.

No. IP 01-0558-C-T/G.

ENTRY DISCUSSING COMPLAINT AND DIRECTING ENTRY OF JUDGMENT

I.

"A provision added to the Judicial Code by the Prison Litigation Reform Act of 1996 requires the district judge to screen prisoner complaints at the earliest opportunity and dismiss the complaint, in whole or part, if . . . it "fails to state a claim upon which relief can be granted."' *Sanders v. Sheahan*, 198 F.3d 626 (7th Cir. 1999) (quoting 28 U.S.C. § 1915A(b)(1)).

The screening process just described must be applied to the complaint of plaintiff David Paul Hammer, a prisoner at the United States Penitentiary at Terre Haute, Indiana, even though the filing fee prescribed by 28 U.S.C. § 1914(a) has been paid. *See Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (affirming that the district court is required to screen pris-

oner complaints at the earliest opportunity and dismiss the complaint, in whole or part, if it fails to state a claim upon which relief can be granted)(citing § 1915A(b)(1)).

II.

A.

Plaintiff David Paul Hammer is an inmate on death row at the United States Penitentiary in Terre Haute (USPTH). In his complaint, signed on April 14, 2001, and filed with the clerk on April 24, 2001, Hammer alleges that the defendants have violated his First Amendment rights. He seeks damages and injunctive relief. The defendants are (1) John Ashcroft, Attorney General of the United States, (1) Harley Lappin, Warden of the USPTH, and (3) Kathleen Hawk-Sawyer, Director of the Federal Bureau of Prisons (BOP). Each defendant is sued in both his or her official and individual capacities. He seeks compensatory and punitive damages and injunctive and declaratory relief. He invokes the theory set forth in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Hammer alleges that since March of 2000, the defendants have personally denied, or supported the policy of such denials, several media requests for face-to-face or videoconference interviews with Hammer. Hammer alleges that although the defendants have approved access to the media through telephonic interviews and correspondence, they have placed the condition on Hammer that he not provide information concerning any other inmate to any member of the media. The defendants have also re-

quired the media to sign an agreement that they will not ask Hammer any questions about any other inmate, will not print anything Hammer might say about any other inmate, and will not broadcast any recording made of any telephonic interview. An additional requirement, that media agree to submit a prepublication draft to the Warden to review for anything that might adversely affect the orderly or safe operation the prison, was eliminated some time prior to December 13, 2000.

B.

Hammer's complaint fails to state a claim upon which relief can be granted. It must therefore be dismissed, with this disposition being compelled by the following facts and circumstances:

1. To the extent Hammer complains of restrictions placed by the defendants on members of the media, he lacks standing to assert such claims. *See Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993)(prisoner has no standing to assert claims on behalf of the media).

2. It is true that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). Nonetheless, under the circumstances alleged, Hammer has no constitutional right to give face-to-face interviews with the media. "Denying media access to conduct face-to-face interviews with inmates is constitutional as long as alternative means for communicating with the media are available." *Johnson v. Stephan*, 6 F.3d at 692

(citing *Pell Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)). Here, Hammer was and is permitted to communicate with the media through telephonic interviews and the mail. Therefore, no violation of his First Amendment rights occurred through the denial of face-to-face or videoconference interviews.

3. Hammer alleges that the restriction placed on him that he not provide any information to the media regarding other inmates violates his First Amendment rights, and that no BOP policy or regulation allows such a restriction. He is mistaken here as to both the facts and the law.

a. On May 1, 2000, Warden Lappin responded to Hammer's request for Administrative Remedy for the denial of two media representatives who intended to interview Hammer about the Oklahoma City bombing, another inmate, Hammer's status as a death row inmate, conditions in death row, and Federal executions, in part, as follows:

> Program Statement 1480.04, *News Media Contacts*, provides guidance for determining the appropriateness of approving news media interviews for inmates. The regulation and policy was promulgated with a provision which recognizes that it is not the Bureau's intent to provide publicity for the inmate via the news media. In addition, the Bureau recognizes that it has the responsibility

to protect the privacy and other rights of inmates and staff. Finally, interviews must be regulated to insure the safe and orderly operation of the institution.

Program Statement 1480.04, *News Media Contacts*, also specifically states, "A representative of the news media shall collect information only from the primary source. A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed."

All requests for interviews are evaluated based upon this policy along with any information available to me with regard to the request.

b. Warden Lappin wrote the following explanation as part of his denial of a face-to-face interview on December 13, 2000:

As you are well aware, the Special Confinement Unit is unique in that it is the only unit in the Federal Bureau of Prisons designed to hold inmates sentenced to death by the federal judicial system. Accordingly, the procedures that govern the operation of the unit are also unique but in accordance with applicable

law and policy. Given the nature of the unit and the potential for disruption that would likely result from one inmate giving information about another inmate without their consent, the requirement that recordings of interviews not be broadcast was imposed. Additionally, requests for in-person media interviews are evaluated on a case by case basis. Though recent requests for in-person interviews have only been approved for telephone interviews, this does not preclude the possibility that future in-person interview requests may be granted. All future requests will also be evaluated in light of the responsibility of the Bureau of Prisons to operate safe and secure institutions that protect the safety and privacy of staff and inmates.

c. Contrary to Hammer's assertion that no BOP policy or regulation permits the Warden to condition any interview on Hammer not providing any information about other inmates, federal regulations specifically authorize such constraints. *See* 28 C.F.R. § 540.60 through § 540.65 ("Contact with News Media").[1]

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[1] 28 C.F.R. § 540.60 (Purpose and Scope) provides, in part, that

d. The Supreme Court has recognized that "the core functions of prison administration [are] maintaining safety and internal security." *Turner v. Safley*, 482 U.S. 78, 92 (1987). It follows that Hammer's claim must be considered in light of the special environment of a prison, where administrators "must be accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted).

e. Even if Warden Lappin's restriction and the regulations upon which that determination was based, infringe on a First Amendment right, the restriction may be upheld. In evaluating prison regulations that allegedly infringe on inmates' constitutional rights,

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[i]t is not the intent of this rule to provide publicity for an inmate or special privileges for the news media, but rather to insure a better informed public. The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution.

28 C.F.R. § 540.61(d) (Authorization) provides that

[a] representative of the news media shall collect information only from the primary source. A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.

the Supreme Court has set forth this test: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 483 U.S. at 89. The Court explained its adoption of this standard as "necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Id.* (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).

f. Here, in prohibiting Hammer from providing information about other inmates, including but not limited to Timothy McVeigh, Warden Lappin's response shows that he considered the very unique environment of the death row unit at USPTH, the privacy concerns of all inmates and staff, and the potential for disruption of the safe and orderly operation of the prison. It is clear that Lappin's decision and the supporting regulations are reasonably related to legitimate penological interests, and they must be upheld.

III.

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85. This responsibility is further complicated when certain functions, such as maintaining the custody of

prisoners on death row, are to be carried out. The proper inquiry in this case is whether the challenged regulation is "reasonably related to legitimate penological interests," *id. at* 89, and on the basis of the complaint the court concludes that the challenged regulations and the Warden's implementation of them meet that standard. No other conclusion is warranted—nor indeed would another conclusion be possible—in the circumstances here.

Based on Hammer's allegations and on the law discussed in Part II of this Entry, Hammer's complaint fails to state a claim upon which relief can be granted. Accordingly, the action shall be dismissed with prejudice. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

/s/ John D. Tinder, Judge
John D. Tinder, Judge
United States District Court

Date: May 24, 2001

Appendix F

Constitutional Provisions and Regulations Involved

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 C.F.R. § 540.63

§ 540.63 Personal interviews.

(a) An inmate may not receive compensation or anything of value for interviews with the news media.

(b) Either an inmate or a representative of the news media may initiate a request for a personal interview at an institution.

(c) Visits by the news media to conduct personal interviews are subject to the same conditions stated in § 540.62. A media representative shall make a request for personal interview within a reasonable time prior to the personal interview.

(d) Staff shall notify an inmate of each interview request, and shall, as a prerequisite, obtain from the inmate written consent for the interview prior to the interview taking place. The written consent or denial becomes part of the inmate's central file.

(e) As a prerequisite to granting the interview, an inmate must authorize the institutional staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments.

(f) The Warden shall normally approve or disapprove an interview request within 24 to 48 hours of the request.

(g) The Warden shall document any disapproval. A request for interview may be denied for any of the following reasons.

(1) The news media representative, or the news organization which he or she represents, does not agree to the conditions established by this subpart or has, in the past, failed to abide by the required conditions.

(2) The inmate is physically or mentally unable to participate. This must be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval.

(3) The inmate is a juvenile (under age 18) and written consent has not been obtained from the inmate's parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are not known, the Warden of the institution shall notify the representative of the news media of the inmate's status as a juvenile, and shall then consider the request.

(4) The interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(5) The inmate is involved in a pending court action and the court having jurisdiction has issued an order forbidding such interviews.

(6) In the case of unconvicted persons (including competency commitments under 18 U.S.C. 4244 and 4246) held in federal institutions, interviews are not authorized until there is clearance with the court having jurisdiction, ordinarily through the U.S. Attorney's Office.

(7) The inmate is a "protection" case and revelation of his or her whereabouts would endanger the inmate's safety.

(h) Interviews are normally held in the institution visiting room during normal weekday business hours. The Warden may:

(1) Determine that another location is more suitable for conducting the interview;

(2) Limit interview time for the entire institution if the Warden determines that the interviews are imposing a serious drain on staff or use of the facilities;

(3) Limit to one one-hour interview per month for an inmate in segregation, restricted, holdover, control unit, or hospital status if required by special security, custodial, or supervisory needs; and

(4) Limit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution.

(i) In conjunction with the personal interview, if the member of the media wishes to tour the institution, he or she must comply with the provisions of § 540.61.

(j) Interviews are not subject to auditory supervision.

Appendix G

From: Fontenot, Jessica - DC
To: cosbyri
CC: fontenot
Sent: 4/12/01 11:33:01
Subject: Ashcroft's words on McVeigh execution

BC-JUSTICE-ASHCROFT-MCVE 04-12 0426 BC-JUSTICE-ASHCROFT-MCVEIGH SKED JUSTICE-ASHCROFT-MCVEIGH sked The Federal Document Clearing House
TRANSCRIPT
April 12, 2001
NEWS CONFERENCE
JOHN ASHCROFT
U.S. ATTORNEY GENERAL
JOHN ASHCROFT HOLDS NEWS CONFERENCE REGARDING THE MCVEIGH
EXECUTION eMediaMillWorks, Inc. (f/k/a Federal Document Clearing House, Inc.)
209 PENNSYLVANIA AVENUE, S.E., 2nd Floor
WASHINGTON, D.C. 20003
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EVENTDATE: 04-12
ATTORNEY GENERAL ASHCROFT HOLDS JUSTICE DEPARTMENT NEWS CONFERENCE REGARDING THE MCVEIGH EXECUTION

APRIL 12, 2001
SPEAKERS: JOHN ASHCROFT, U.S. ATTORNEY GENERAL
(+)

ASHCROFT: Good Morning.

In 1988, the federal death penalty was reinstated by the United States Congress and the president with the enactment of the Anti-drug Abuse Act. In 1994, Congress and the president expanded the capital sentencing available under the federal law in the Federal Death Penalty Act.

Under these two legislative acts, the federal statutes allow the death penalty for some of the most heinous and violent crimes imaginable. These include the intentional killing, espionage and treason, a kidnapping or conspiracy that results in a murder, killing a law enforcement officer, or committing a major drug trafficking crime.

Under both laws, before the death penalty can be imposed, a special hearing is required to determine whether a sentence of death is justified. A jury following a death-eligible conviction must determine whether a sentence of death is justified based on evidence and arguments presented by each side and instructions from the court.

On June 2, 1997, a jury convicted Mr. Timothy McVeigh of the April 19, 1995, bombing of the Alfred P. Murrah building in Oklahoma City. This brutal act of terrorism killed 168 innocent people, including 19 children, and injured hundreds more. Its savagery stole parents from 219 children and made

30 children orphans in a single act. This cowardly crime against our nation was the largest terrorist attack ever within the United States of America.

ASHCROFT: On June 13, 1997, the jury that heard the case of the Oklahoma City bombing made a recommendation of death for Mr. McVeigh, and the sentence was imposed by a federal judge on August 14, 1997.

Mr. McVeigh's conviction was confirmed on direct appeal, and his post-conviction challenges have been rejected by the courts. Mr. McVeigh has exhausted his right to any further appeals, and he is scheduled to be executed on May 16, 2001.

The last death penalty imposed by the federal courts under the federal law occurred in 1963. The policies the Justice Department outlines today will provide the basis for handling future executions ordered by federal courts. These policies will be written into the appropriate documents and made available to the public, including the final execution protocol.

The Bureau of Prisons has been preparing to fulfill its responsibilities under the law for years now, and we have consulted closely and thoroughly with them in establishing these policies.

As you know, I also met with about 100 survivors and victim family members on Tuesday to hear their stories and try to understand their loss.

ASHCROFT: The magnitude of this case is certainly stunning. My time with these brave survivors changed me. What was taken from them

can never be replaced nor fully restored. Their lives were shattered. And I hope that we can help to meet their need to close this chapter in their lives.

I also hope that their experience in Oklahoma City is unique in our American experience. Obviously, this case has many unique elements, and it is a unique set of circumstances that confront us. The Oklahoma City survivors may be the largest group of crime victims in our history, so the Department of Justice must make special provisions to assist the needs of the survivors and victims' families in accordance with our responsibilities to carry out justice.

Current Bureau of Prisons regulations allow for eight witnesses. This is plainly inadequate. As attorney general, I authorize the following measures for victims of this crime.

First, we have decided to allow two additional citizen witnesses to be present at the execution in Terre Haute. This will bring the total number of citizen witnesses to 10 and will equal the number of media witnesses. These witnesses will be selected by lottery, as was done for the trial.

ASHCROFT: Second, under these special circumstances, we will arrange for a closed-circuit transmission of these events to Oklahoma City, just as was done during the trial pursuant to the congressional authorization.

The closed-circuit transmission will take place at a facility in Oklahoma City that is yet to be determine. The Bureau of Prisons will work with the FBI's Crisis Response Unit to provide a highly reliable and

secure closed-circuit audio and video transmission from the United States penitentiary in Terre Haute to the designated site in Oklahoma City.

The broadcast will use the latest encryption technology integrated with state-of-the-art video-conferencing over high-speed digital telephone lines. Federal regulations prohibit any recording of the execution. Therefore, any closed-circuit transmission will be instantaneous and contemporaneous.

Because of our concerns about attempts to steal or disrupt the transmission signal, we will not be able to provide any further details about the transmission process.

The transmission to the victims in the Oklahoma City area will begin at the same time the curtain is opened for viewing by victim witnesses in the execution facility.

ASHCROFT: All witnesses will see Mr. McVeigh on the execution table, and they will be able to hear any final statement Mr. McVeigh makes.

Third, at the request of the victims I met with on Tuesday, we will show those who are watching from Oklahoma City a video with footage of the site in Terre Haute, including the execution room. In addition, we will have representatives of the Bureau of Prisons on site to help prepare these witnesses for what they will see on the closed-circuit transmission.

Finally, I realize after visiting with survivors and victim's families that there are some people who in the event that they are not one of the 10 citizen witnesses still want to be present in Terre Haute,

even if they cannot view the execution via closed-circuit television. For those victims, we will provide an area in Terre Haute near the prison facility.

To those of you here, I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as attorney general of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates will be limited to each inmate's ordinary allotment of telephone time.

ASHCROFT: Inmates in the special confinement unit in Terre Haute are allowed a 15-minute personal telephone call each day. Inmates can use those calls in any way they choose, including interviews with the media. Requests for interviews may be made to the warden. Should an inmate agree to an interview, the warden with coordinate the setting up of the interview.

If the news media conducts an interview with Timothy McVeigh, I would ask them for self-restraint. Please do not help him inject more poison into our culture. He's caused enough senseless damage already.

We are already being sued to provide more publicity for this execution. I would ask that the news media not become Timothy McVeigh's co-conspirator in his assault on America's public safety and a upon America itself.

Finally, unless a court intervenes, the execution is expected to proceed as scheduled at 7 a.m. on May 16, 2001.

ASHCROFT: I would now like to introduce Kathleen Hawk Sawyer, director of the Federal Bureau of Prisons. The Bureau of prisons has done a great deal of work in preparation for this execution, and I want to commend the director and her staff for a job well-done.

Ms. Hawk Sawyer?

KATHLEEN HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS: I will provide some information on the sequence of events leading up to the execution.

On April 6, 2001, inmate McVeigh was briefed by the warden on aspects of the execution process, including the inmate witnesses, disposition of both his personal property and his body, and his last meal.

Beginning seven days prior to the execution day, McVeigh will have access to only his spiritual advisers, his defense attorneys, and members of his family, and employees of the Bureau of Prisons.

Approximately 24 to 72 hours before the execution, he will be moved to the execution facility holding cell. Twenty-four hours before the execution, his telephone calls will be restricted to those approved by the warden or calls to his attorneys. McVeigh's attorneys, spiritual advisers and immediate family members will be provided noncontact visiting privileges up to two hours before

the execution. McVeigh will be allowed to receive mail and reading material. He will be under constant staff supervision.

Two hours prior to the execution, all visitors and attorneys will leave the execution facility. At this time, the institution will establish an open telephone line with the Department of Justice command center.

Approximately one hour prior to the execution, McVeigh will be searched by the escort team, secured with restraints, removed from the holding cell, and escorted to the execution room by our escort team, and the staff participating in this execution process will be on a voluntary basis only.

HAWK SAWYER: Once in the execution room, the ambulatory restraints will be removed. He will then be restrained to the table, and the IVs will be inserted.

The government witnesses will already be in the government witness room. At this time, the remaining three groups of witnesses will be admitted to the facility in separate rooms.

McVeigh will be able to selected six witnesses, to include a spiritual adviser, two attorneys and three family members or friends.

The media will be represented by 10 witnesses.

The regulations allow for up to eight victim witnesses in the execution facility, but due to the extraordinary number of victims in this case, as the attorney general noted, the number of victim witnesses has been expanded to 10, the maximum

number that the victim witness room will accommodate.

The drapes will be opened and the warden will provide McVeigh with an opportunity to make a short final statement. The warden will read relevant portions of the judgment and commitment order and then ask the marshal if the execution can proceed. The marshal will then check with the Department of Justice command center, and absent a stay entered by the court, the execution will occur as scheduled.

Provided there are no legal impediments to proceeding, the marshal will inform the warden to proceed. At this point, the lethal chemicals will be administered. The warden will announce the time of death and inform the witnesses that the execution has concluded. The drapes will then be closed and the witnesses will be escorted out of the facility. The coroner will then sign the death certificate. The United States marshal will complete and sign the return.

Immediately following notification of death, staff will make an announcement from the press briefing area and a post-execution press briefing will be conducted shortly thereafter.

HAWK SAWYER: I would also like to make a brief comment about arrangements for demonstrators. The institution has developed procedures to allow demonstrators to exercise their First Amendment rights. Demonstrators will be permitted to begin demonstrating shortly after midnight on May 16, 2001. At 12:01 a.m., buses will begin transporting demonstrators from designated locations to areas on

the grounds of the United States Penitentiary Terre Haute.

Separate areas on institution grounds will be provided for those who support and for those who oppose the death penalty. Demonstrators will be limited as to what they can bring to the demonstration area. Demonstrators 17 years of age or under must be accompanied by an adult.

Following the execution, the buses will begin transporting participants back to the appropriate parking areas.

Thank you.

QUESTION: Attorney General, as I understand it, the public witnesses and the witnesses in Oklahoma will be able to hear Timothy McVeigh's last statement. Is there any concern that he may use that last statement to taunt the survivors and the relatives of those killed?

ASHCROFT: Mr. McVeigh's expressions have frequently been offensive, and I think it's understood that they have been of notable offense to the survivors. Among the offenses to the survivors that have already been cited is his reference to the children who were killed as, quote, "collateral damage." Obviously, we have no way of anticipating what his last words will be.

QUESTION: You had asked for the media to exercise self-restraint. Are you suggesting that in your view that there not be interviews with McVeigh, that they not be requested? What is your view on that?

ASHCROFT: We have provided a basis for the inmate to express himself up to 15 minutes a day, and made provision that the media be, with his permission, allowed to speak with him during that interval. I would just hope that, in its exercise of its responsibilities, that the media would be responsible. I am not trying to define for the media what their responsible position would be.

QUESTION: Does asking for an interview or conducting an interview constitute giving him a platform, in your view?

ASHCROFT: Obviously, if no one were to call him and interview him, he would have less platform than he would otherwise have.

Yes, sir?

QUESTION: Let me ask you about the precedent for two of these decisions, both on closed circuit and on media interviews. Are you saying here that in the future federal executions can be televised by a closed circuit? Or is this just specific to McVeigh?

And, also, interviews, can other federal inmates on federal death row be interviewed or is that policy specific to McVeigh as well?

ASHCROFT: By and large, the procedures that have been outlined here are procedures which we think will shape and inform the policies of the Bureau of Prisons and the Department of Justice in future settings.

ASHCROFT: There are unique circumstances here that have been recognized by the Congress, in terms of the scale of those whose lives have been affected.

For instance, the trial was the subject of congressional specific funding and authority for closed-circuit television. So I would say that while there are precedential procedures here, there are obviously unique circumstances that are reflected in the way that this entire circumstance has been approached.

QUESTION: Attorney General, do we understand you to say that there will be no television interviews allowed at the facility?

ASHCROFT: The access that Mr. McVeigh has for communication will be limited to the access provided to inmates in this special unit, and it is a 15-minute per day telephone opportunity for any inmate in that setting to contact and express himself to others.

I should clarify that just a little bit. A spiritual adviser of an inmate has an opportunity to go to the unit and to confer with them. The legal advisers to the inmates are not governed by the 15-minute limitation.

And you would clarify that for me, if it needs clarification.

QUESTION: Governor...

ASHCROFT: Call me what you want to call me. I've been there.

QUESTION: General, the governor of Oklahoma and others, the senators and the folks down there said, all of Oklahoma has been a victim of this crime. Have you considered at all some way to let all the Oklahoma victims who are not registered witness this execution?

ASHCROFT: There is a sense in which every American is a victim of this crime. It's clear that this was an assault on America, and it was, in my judgment, a cowardly assault that tragically disrupted the lives of people in a devastating way in Oklahoma.

One of the reasons that we have media and press witnesses in these events is to provide a basis for the culture's understanding of the event with a view toward understanding that we are all victims.

Let me just say that when I indicate that we are all victims, I in no measure want to suggest that we are victims as the families were in Oklahoma. Having spoken with children who lost fathers, with mothers who lost daughters, with grandmothers who lost daughters and grandchildren in the same calamity, their loss is most tragic and virtually unspeakable.

QUESTION: Mr. Ashcroft, you've been outspoken in your comments on school shootings and violence, that there's a danger of encouraging copycat crimes by the sensationalizing of these catastrophic events through extensive media coverage. Has the thought occurred to you that your decision today might encourage that also?

ASHCROFT: I am concerned about what I think I referred to as a culture of violence. I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly. We think it would be a tragedy compounded if, in some way, the decision of

the United States to require the ultimate penalty here were to provide a basis for Timothy McVeigh to extend his assault and further extend his disruptive conduct on America. With that in mind, we have sought to undertake this in the way that is likely to minimize those concerns.

QUESTION: Mr. Ashcroft, you said that Timothy McVeigh had exhausted his appeals. But if his legal advisers and he should change their minds and decide to pursue some other legal avenue, do we understand that they may do so, and he could be removed from the holding cell and the whole issue delayed up to two hours before the execution?

ASHCROFT: Mr. McVeigh has exhausted his appeals. And the execution will proceed as scheduled, unless a court intervenes to set it aside.

QUESTION: That would be at this request, I would assume?

ASHCROFT: I don't think I would envisage anything else, but if a court does not intervene to set it aside, this execution will proceed.

QUESTION: Would the telephone calls, if he chooses to do media interviews by the telephone, would recordings of those phone calls be allowed to be broadcast?

ASHCROFT: No. They're not to be recorded calls.

QUESTION: How will the 10 citizen witnesses be selected?

ASHCROFT: The citizen witnesses are to be selected by lottery, and the lottery conducted in the

same way that the lottery was conducted to provide access to the trial. And so it will be a lottery system which provides access for those citizen-victim witnesses.

QUESTION: You said your meeting with the survivors has changed you. How has it changed you?

ASHCROFT: I had an intellectual understanding of what happened at Oklahoma City. But visiting the memorial and visiting with the witnesses gave me an emotional understanding.

If you've had the privilege of being to the memorial in Oklahoma City – and frankly, I think it's an exercise in understanding freedom and the threats to freedom that is a therapy and is a valuable one.

The first room they took me into was a room which re-created a meeting that was under way and they literally had the tape recording of I believe what was the Oklahoma Water Resources Board meeting. And you listen to the tape of the woman who was reading into the record the parties for the meeting, the concerns to be dealt with at the meeting and, all of a sudden, you literally here on an actual – not a re-creation, but an actual tape recording – the concussive and the chaos and the falling debris.

I did this standing next to two individuals. One individual whose daughter and unborn grandchild had been killed in the debris, and the other individual was a woman who had been in the building at the time of the blast.

Very frankly, that was just a profound signal to me that this was not a set of statistics. Sometimes the numerics of massive tragedies tend to get lost in the statistics.

ASHCROFT: And 168 is such a big number that it's hard to process just because of the numerics and the hundreds of additional individuals who were bloodied and battered and crushed, and there were amputations in the building on the spot with inadequate and nonclinical facilities just to get people out from under the rubble.

It became a reality to me in an emotional way that sort of displaced in many respects the intellectual understanding.

And let me just go one step further. In talking to these victims – and this is not all the victims, there may be other victims that had different experiences – a number of victims, because of the nature of this calamity, were advised by authorities not to view the remains of their deceased relatives. Some of the deceased relatives, frankly, were not extricated from the rubble for as long as three or four weeks.

And for those individuals, they had stories to tell. They recounted personal circumstances of the absence of closure. They didn't have the ability to say: I came to grips with this, because I never saw it. It's as if my family left one day, and they never came back. We never saw their remains or their bodies.

ASHCROFT: And for these individuals, it is important in a unique way that they see at least – and I think they believe that, and I believe they are

right – that they have a capacity to witness this event.

And so, it's with that in mind that, frankly, my intention to accommodate with closed-circuit, secure transmission of these events was galvanized, and this is something that justice requires, and it's an appropriate responsibility for the Justice Department to carry out.

QUESTION: How many people will be allowed to view via closed circuit? It is going to be just limited to the 250 or so who've previously signed up? Is there an additional number that will be allowed?

ASHCROFT: This will be dealt with at the local level by the same officials who orchestrated and otherwise dealt with the trial. The exact numbers may depend on the expressions of interest. But by and large, an inventory has been made of individuals who have expressed an interest, and I believe we'll be able to accommodate them.

QUESTION: You said that media interviews with McVeigh can't be recorded. Or just maybe a question for the prison director, is that normally Bureau of Prison policy? And how do you enforce it, since anybody can presumably tape a telephone...

ASHCROFT: I thought he addressed it to you.

HAWK SAWYER: OK. Our current policy is a broad policy that provides the parameters for all of the Bureau of Prisons institutions.

HAWK SAWYER: Each institution is able to develop local policy, institution supplements, that define the unique nature of any particular missions

within their institution. So this policy will apply to the special confinement unit where inmates are held.

And when you asked the question of "Can we really ensure that that's followed?" we will make that arrangement and that understanding with members of the media who seek to have a media interview. And then it will be simply up to the integrity and honor of the media representative to follow that.

QUESTION: Is it specific to this execution? Or is that going to be the protocol for all future federal executions?

HAWK SAWYER: It will become the policy for the special confinement unit in general.

ASHCROFT: I thank you all very much. Thank you.

Appendix H

U.S. Department of Justice
Federal Bureau of Prisons
U.S. Penitentiary
Terre Haute, IN 47808

Number: THA-1480.05A
Date: April 16, 2001
Subject: News Media Contacts

Institution Supplement

1. PURPOSE: To provide guidelines for implementing the Bureau of Prisons Program Statement on this subject. This Institution supplement must be read in conjunction with the Bureau of Prisons' Program Statement.

2. DIRECTIVES AFFECTED: Bureau of Prisons Program Statements 1480.05, News Media Contacts, dated 09/21/00; and 5840.04, Staff Correspondence About Inmates, dated 09/01/00; are referenced. Institution Supplement 1480.3C, Contact with News Media, dated 02/08/99, is hereby superseded.

3. CORRECTIONAL STANDARDS REFERENCED: 3-4021-1.

4. PROCEDURES: The Executive Assistant is delegated the responsibility for implementing this program and for its continued operations, and shall notify the Warden of any unusual circumstances, events or incidents which might prove newsworthy.

   A. Inmate/Media:

      (1) An inmate may initiate an interview with the news media by regular

correspondence or through inmate correspondence procedures. Representatives of the news media or other publications may initiate an interview with a particular inmate through correspondence.

(2) When an interview request is received, the request will be submitted to the inmate the media representative has requested to interview. The inmate will accept or decline the request in writing via the BP-S233.014 form, News Interview Authorization.

(3) The interview request will then be directed to the Chief Executive Officer. Once reviewed and approved, the request will be routed to the Public Information Officer (PIO) or the Executive Assistant, who shall be responsible for coordinating, monitoring, and supervising the interview. It shall be the responsibility of the PIO to ensure that all necessary forms are completed as indicated below:

(a) Prior to the Interview, the news media representative shall complete the BP-S232.014, Media Representative Agreement Form. The news media representative also should review Program Statement 1480.05, News Media Contacts prior to the interview. The original of each of the above-mentioned forms will be

placed in the concerned inmate's Central File, and a copy will be provided to the media representative.

(b) Interviews will not be subject to auditory monitoring. Interviews will be conducted only Monday through Friday, excluding holidays. Camp interviews will be arranged individually after consultation with the Camp Administrator. Any exception to the above must be approved by the PIO after consultation with the Chief Executive Officer.

(c) Photographs, audio, and/or video recordings may be made with the prior approval of the Chief Executive Officer, and the signing of the appropriate consent forms by the inmate. So as not to disrupt other visitors, video recording may be limited to periods during which no other visitors are utilizing the Visiting Room (7:30 AM to 8:00 AM), or at such other times as determined by the PIO with the approval of the Chief Executive Officer.

B. Special Confinement Unit (SCU)

(1) To maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted.

(2) SCU inmates normally have access to the media through the General and Special Mail Procedures, as well as monitored and unmonitored telephone calls. The policies on correspondence and telephone regulations apply, except as modified for SCU inmates.

(3) **Monitored Media Telephone Calls** - SCU inmates requesting media representatives be placed on their approved social telephone list for monitored, unscheduled calls must have the media representative complete the Conditions for Media Telephone Contact form (Attachment A). The media representative must submit the completed form to the Executive Assistant or PIO before being placed on the telephone list. Monitored telephone calls to media representatives count against the SCU inmate's allotted time for social calls, and are subject to the 15-minute duration limit.

(4) **Unmonitored Media Telephone Interviews** - Requests for unmonitored media telephone interviews must be approved by the Warden and coordinated through the Executive Assistant or PIO according to the following procedures:

(a) If a media representative requests a telephone interview, the SCU inmate will accept or decline the request on

Form BP-S233.014, News Interview Authorization. If the SCU inmate accepts, the media representative must complete the Conditions for Media Telephone Contact form (Attachment A) and return it to the Executive Assistant or PIO. Media interviews will be unmonitored.

(b) SCU inmate requests for unmonitored telephone interviews should be submitted on a Form BP-148.070, Inmate Request to Staff Member. The SCU inmate will also forward the media representative a copy of the Conditions for Media Telephone Contact form (Attachment A). The media representative must complete the form and return it to the Executive Assistant or PIO.

(c) Unmonitored telephone interviews with media representatives count against the SCU inmate's allotted time for social calls, and are subject to the 15-minute duration limit.

(5) Media interviews and telephone calls to media representatives within seven days of that SCU inmate's execution date are prohibited.

C. Staff/Media:

(1) The Warden and the designated PIO or (Executive Assistant) are the only staff authorized to make statements to the

news media regarding institutional matters. In potentially newsworthy situations, the Institution Duty Officer shall notify the PIO and the Administrative Duty Officer of factual events which have occurred. Upon consultation with, and the approval of the Chief Executive Officer, the PIO will prepare and disseminate a press release, if appropriate. All press releases must be approved by the Chief Executive Officer.

(2) If a media inquiry is received after normal duty hours, the following information will be noted: the inmate's name, the caller's name, telephone number, organization represented, and the nature of the request by the caller. This information will be communicated to the Operations Lieutenant who shall notify the PIO, or if the PIO cannot be reached, the Institution Duty Officer. In accordance with the Bureau of Prisons' Program Statement 1480.05, News Media Contacts, Page 5, CN-1, the Institution Duty Officer is authorized to release only basic public information, i.e., inmate name, number, location (if not a WITSEC inmate), offense, length of sentence, etc. Any other information will be released only by the PIO, Warden, or Acting Warden. It shall be the responsibility of the Institution Duty Officer to ensure that on the next

regularly scheduled workday, the PIO is made aware of any after hours contacts by the news media.

5. RESPONSIBILITY: The Executive Assistant is responsible for the contents and the annual review of this Institution Supplement. Any requests for procedures other than those described in this supplement must be authorized in writing by the Chief Executive Officer.

/s/ Harley G. Lappin
Harley G. Lappin, Warden

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THA-1480.50A
Attachment A

Conditions for Media Telephone Contact with Inmates in The Special Confinement Unit (SCU), USP Terre Haute

The Special Confinement Unit (SCU) of the United States Penitentiary, Terre Haute, Indiana, is a maximum security federal prison facility housing many physically violent, predatory, and escape prone inmates. In order to maintain the safety, security and good order of the SCU, the Warden may regulate your telephone contact with SCU inmates.

By signing this form, you acknowledge and agree to the following conditions regarding your telephone contact with the following SCU inmate:

_____, _____,
(Inmate Name) (Reg. No.)

If evidence indicates you violated this agreement, or any of the rules or regulations of the USP Terre Haute, your ability to contact inmates in Bureau custody by telephone may be restricted.

1. **TELEPHONE CONVERSATIONS WITH AN SCU INMATE MAY NOT BE RECORDED OR BROADCAST.**

2. You are prohibited from asking or discussing with the above-named SCU inmate any information regarding other federal or state inmates. If the above-named SCU inmate provides you with any information regarding other federal or state inmates, you are prohibited from publishing such information. Comments

made by one inmate concerning another could violate the privacy interests of the other inmate, and might cause a reaction that could threaten the safety, security, or good order of the institution.

3. You are prohibited from publishing information about operational procedures or security features of the institution, insofar as it may threaten the safety, security, or good order of the institution.

4. If the above-named SCU inmate makes allegations regarding a staff member, the institution, or the Bureau of Prisons, you must exercise your professional responsibility to make reasonable attempts to verify these allegations, and afford the institution the opportunity to comment.

_____ _____

Signed Name Date Signed

_____

News Organization

Supreme Court, U.S.
FILED
JAN 27 2010
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No. 09-504

In the Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In *Pell* v. *Procunier*, 417 U.S. 817 (1974), and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), this Court held that prison policies prohibiting face-to-face interviews between prisoners and the media were consistent with the First Amendment. The question presented here is:

Whether a policy specific to the death-row unit at the United States Penitentiary in Terre Haute that permits prisoners to have contact with media representatives through written correspondence or approved telephone calls but prohibits them from conducting face-to-face interviews with the media is reasonably related to legitimate penological interests.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-30a) is reported at 570 F.3d 798. The panel opinion of the court of appeals (Pet. App. 31a-48a) is reported at 512 F.3d 961. The opinion of the district court (Pet. App. 49a-62a) is unreported. A prior opinion of the court of appeals (Pet. App. 63a-70a) is not published in the *Federal Reporter* but is reprinted in 42 Fed. Appx. 861. The original order of the district court dismissing the case (Pet. App. 71a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2009. On September 15, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 23, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a prisoner on federal death row, housed with the other death-row inmates in the Special Confinement Unit (SCU) at the United States Penitentiary (USP) in Terre Haute, Indiana. Gov't C.A. Br. 3. The Bureau of Prisons (BOP) opened the SCU in July 1999 to house male inmates sentenced to death by federal courts. Pet. App. 32a. The SCU also houses inmates on "administrative detention status." *Ibid.*

Petitioner pleaded guilty and was sentenced to death for murdering his cellmate while confined at USP-Allenwood. As the district court in his criminal case explained:

> [Petitioner] did not dispute that he tied Mr. Marti to the bed, put a sock in Mr. Marti's mouth, put Mr. Marti in a sleeper hold, rendered him unconscious, and then took a piece of cloth and strangled him to death. [Petitioner] did not deny that he told inmates prior to the incident that he was going to kill Mr. Marti. The portions of Government counsel's summary which [petitioner] did not deny compelled the court to find intent to kill (malice) and premeditation.

United States v. *Hammer*, 404 F. Supp. 2d 676, 683 (M.D. Pa. 2005), as amended, No. 4:CR-96-239 (M.D. Pa. Jan. 3 and 4, 2006).[1]

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[1] The court upheld petitioner's guilty plea, but vacated the death sentence subject to retrial on the penalty for reasons unrelated to this appeal. 404 F. Supp. 2d at 801 (ordering retrial on penalty because of *Brady* violations). The Third Circuit dismissed the parties' appeals for

2. a. The BOP operates under policies that are promulgated in Program Statements applicable to BOP institutions. Individual institutions within the federal prison system are permitted to issue institution-specific policies in Institution Supplements. Gov't C.A. Br. 3. Following reintroduction of the federal death penalty and activation of the SCU, "it became necessary to devise new, and alter existing, policies to address the unique needs of the SCU." C.A. Supp. App. 10.

Program Statement 1480.05, adopted in September 2000, addresses news media contacts and directs each institution to develop its own Institution Supplement. C.A. App. 139-149. Pursuant to that directive, on April 16, 2001, USP-Terre Haute issued Institution Supplement THA-1480.05A (and THA-1480.05B, which is identical, except for the date and signature). Pet. App. 103a-111a. THA-1480.05A provides that, among other things, "[a]n inmate may initiate an interview with the news media by regular correspondence or through inmate correspondence procedures" and that news media representatives "may initiate an interview with a particular inmate through correspondence." *Id.* at 103a-104a.

For SCU inmates, THA-1480.05A provides that "[t]o maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted." Pet. App. 105a. Like all inmates at USP-Terre Haute, SCU inmates retain access to the media through "the General and Special Mail Procedures, as well as monitored or unmonitored phone calls." *Id.* at 106a, 107a. An SCU inmate who wishes to

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lack of a final order. 564 F.3d 628 (2009). The government has until April 2010 to state its intentions with respect to resentencing. See 96-CR-239 Docket entry No. 1256 (M.D. Pa. Aug. 27, 2009). In the meantime, petitioner remains housed on death row in the SCU.

contact a media representative by phone must place that person on his approved social telephone list for monitored, unscheduled calls, and the media representative must complete a "Conditions for Media Telephone Contact" form. *Id.* at 106a. That form requires the media representative to agree to certain conditions, including:

1. **TELEPHONE CONVERSATIONS WITH AN SCU INMATE MAY NOT BE RECORDED OR BROADCAST.**

2. You are prohibited from asking or discussing with the above-named SCU inmate any information regarding other federal or state inmates. If the above-named SCU inmate provides you with any information regarding other federal or state inmates, you are prohibited from publishing such information. Comments made by one inmate concerning another could violate the privacy interests of the other inmate, and might cause a reaction that could threaten the safety, security, or good order of the institution.

Id. at 110a-111a. SCU inmates can also request unmonitored telephone interviews. *Id.* at 106a-107a.

As respondent Harley G. Lappin, former Warden at USP-Terre Haute (Warden Lappin), explained, the new policy was intended to balance the interests of the SCU inmates and the journalists, with the interests of BOP in security and good order and the rights of all inmates. C.A. Supp. App. 11. One concern underlying the prohibition on face-to-face interviews and publication of recordings of interviews was that inmates would gain "special status" through media exposure. *Ibid.* As Warden Lappin explained, inmates must all be of equal status at the prison because an inmate with greater status

can become a "jail celebrit[y]," who is "an authority figure to other inmates" and can "compete with staff members for influence over the inmate population." *Ibid.*

In addition, prison officials were concerned that publication of statements about other inmates would infringe on privacy rights. Pet. App. 110a-111a. "[I]n a correctional setting, real or imagined slights, insults or provocations can cause inmate on inmate violence that can have dire consequences for inmates, staff members, and the public safety." C.A. Supp. App. 12. Warden Lappin believed that prohibiting the publication of statements about other inmates was the least restrictive means of addressing that concern; the regulation "did not affect the content of the interview," only "the end result." *Ibid.* If a journalist wanted to include information obtained about another inmate, he could request an interview with that inmate. *Ibid.*

b. In March 2000, "60 Minutes" aired a face-to-face interview with Timothy McVeigh, another inmate housed in the SCU. Pet. App. 33a. More than a year later, on April 12, 2001, then-Attorney General John Ashcroft held a press conference to discuss logistics and policies surrounding McVeigh's scheduled execution, the first federal execution since 1963. See *id.* at 85a-102a. The press conference dealt primarily with the death-penalty procedures for McVeigh, and secondarily with the ban on face-to-face interviews. In discussing "media outlets" that had requested interviews with McVeigh, Attorney General Ashcroft stated that "[a]s an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. * * * I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates

will be limited to each inmate's ordinary allotment of telephone time," which can be used "in any way they choose." *Id.* at 90a. When later asked by a reporter whether his "decision today" (apparently referring to the announced plan to allow victim and media witnesses to attend McVeigh's execution) might also "encourag[e] copycat crimes by the sensationalizing of these catastrophic events through extensive media coverage," Attorney General Ashcroft responded that he was "concerned about * * * a culture of violence," and about "irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly." *Id.* at 97a.

3. On April 24, 2001, petitioner filed this pro se *Bivens* action, seeking damages and injunctive relief against several federal officials in their individual and official capacities and alleging that they violated his First Amendment and equal protection rights by implementing and enforcing a policy that prohibits him from having face-to-face interviews with the media and from talking to the media about other inmates. The district court screened the complaint under 28 U.S.C. 1915A(b)(1) and dismissed it for failure to state a claim. Pet. App. 71a-79a.

The court of appeals reversed and remanded (Pet. App. 63a-70a), concluding that "[a]t th[e] early pleading stage," the district court should have taken petitioner's allegations as true and concluded that they stated a claim, *id.* at 69a.

Petitioner filed an amended complaint on January 2, 2003, alleging, *inter alia*, that THA-1480.05A violated

his First Amendment and equal protection rights.[2] On February 23, 2006, the district court granted summary judgment in favor of respondents. Pet. App. 49a-62a. The court explained that "inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content." *Id.* at 54a (citing *Pell* v. *Procunier*, 417 U.S. 817, 827-828 (1974)). Applying the four *Turner* factors, see *Turner* v. *Safley*, 482 U.S. 78 (1987), the court concluded that petitioner had not met his burden of showing that the policy was not reasonably related to legitimate penological interests. Pet. App. 55a, 58a-62a.

4. After appointing counsel to brief and argue the appeal on petitioner's behalf, a panel of the court of appeals reversed and remanded, concluding that petitioner "raised a genuine issue of fact as to whether [respondents'] proffered justification for the policy banning face-to-face interviews is pretextual." Pet. App. 32a.

On petitioner's First Amendment claim, the panel read *Turner*'s first prong to require that "the penological interest that the prison officials invoke in court to justify the restriction must have actually motivated them at the time they enacted or enforced the restriction." Pet. App. 40a. According to the panel, petitioner had submitted evidence supporting his claim that the security justification for the policy was a pretext for "outrage over [Timothy] McVeigh's message and a de-

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[2] In March 2004, petitioner moved to dismiss his case, citing his imminent execution date of June 8, 2004, and the court dismissed the case without prejudice. Gov't C.A. Br. 7. The Third Circuit later stayed his execution, petitioner moved to vacate the judgment, and the district court reinstated the media-access claims. *Ibid.*

sire to prevent other death row inmates from expressing their views about themselves or their fates and thereby influencing 'our culture.'" *Id.* at 41a. In other words, the court believed that petitioner's evidence tended to show that Warden Lappin may have been "lying about the rationale" for the policy in his sworn declaration. *Id.* at 41a-43a, 45a. Turning to the other *Turner* factors, the panel concluded that the alleged "ban on discussing other inmates with the media," "cast doubt on whether the media policy leaves open sufficient alternate routes of access to the media." *Id.* at 43a.

On petitioner's equal protection claim—that the policy treated death row inmates at the SCU differently from other inmates—the panel was persuaded that a question of fact existed on whether such inmates were treated differently "because they are disproportionately likely to become jailhouse celebrities or inflame tensions with other inmates," or because they are "disproportionately likely to promote a 'glamorization of violence." Pet. App. 43a-44a. The panel left the issue of qualified immunity to the district court on remand. *Id.* at 46a.[3]

5. The court of appeals granted rehearing en banc, vacated the panel decision, and affirmed the judgment of the district court. Pet. App. 1a-30a.

a. The en banc court recognized that this Court had already upheld a system-wide BOP policy prohibiting face-to-face interviews by the media, Pet. App. 4a (citing *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974)), and rejected petitioner's argument that BOP could not enforce that rule against some prisoners but not others,

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[3] The panel also held that the district court erred in denying petitioner's motions for a continuance and for counsel, and in granting summary judgment for respondents John Ashcroft and Kathleen Hawk-Sawyer. Pet. App. 45a-48a.

id. at 4a-5a. The court explained that the rule was based on security needs, and the need for security differs at different institutions. *Ibid.* A case in point, the en banc court observed, was the policy upheld in *Washington Post* itself, which allowed media interviews at minimum-security institutions but not medium- or maximum-security institutions. *Id.* at 5a. The court concluded that BOP was not required to permit access to *all* prisoners simply because it allowed access to some, nor was it required to use the least restrictive alternative. *Id.* at 5a, 6a-7a. *Turner* requires only that a prison choose a rule "reasonably related to legitimate security interests," a condition the court found satisfied here. *Id.* at 6a-7a.

The court rejected petitioner's claim that the current policy was prompted by criticism of Timothy McVeigh's interview with "60 Minutes," and that Attorney General Ashcroft was motivated by a desire to silence death-row inmates. Pet. App. 8a-9a. The court explained that a "blanket ban," as opposed to a case-by-case approach, was "neutral" as to content. *Id.* at 7a. And the court found it unclear "why one bad motive would spoil a rule that is adequately supported by good reasons." *Id.* at 10a. After all, the court observed, this Court "did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry." *Ibid.*

The en banc court also found "nothing unconstitutional" about Attorney General Ashcroft's views: "[o]pposing a 'culture of violence' is an ordinary, and desirable, goal for a criminal prosecutor." Pet. App. 11a. Indeed, the court explained, the desire to prevent people from becoming "celebrities by committing crimes," was found to be a legitimate basis for curtailing press access

in *Washington Post*, "not a constitutionally infirm one." *Ibid.* The court concluded that where, as here, prisoners have access to the press through written correspondence and telephone calls, prohibiting face-to-face interviews does not unduly infringe on prisoners' constitutional rights. *Id.* at 13a-14a.

As for the prohibition on publishing information about other inmates, the court found it rational to think (as prison officials did) that "[t]elling tales about fellow inmates may make them angry (if the tales are defamatory) or may make yet other inmates envious (if the tales are flattering). In either event, disorder may follow." Pet. App. 14a. The court concluded that, because other avenues of expression (including the courts) were available, concerns that misconduct would be concealed were misplaced and outweighed by the legitimate governmental interest. *Id.* at 14a-15a.

Because it agreed that THA-1480.05A was valid, the court did not decide whether a *Bivens* action was a proper vehicle for challenging an administrative rule, or whether qualified immunity should attach. Pet. App. 3a-4a.

b. The panel judges dissented. Pet. App. 15a-23a, 23a-30a. Judge Rovner, joined by Judge Bauer, argued that the original panel opinion reached only "the limited—indeed, even pedestrian—conclusion that a trier of fact must resolve" whether the "jailhouse-celebrity concern" put forward by the Warden was "legitimate" or a "convenient explanation to justify a policy designed to control the speech content of a particular subset of prisoners." *Id.* at 16a. The dissent was concerned about the lack of alternative means to specifically discuss other inmates, believing that "[u]nder the current policies an inmate could be disciplined for informing the media

* * * that another inmate is being abused by a guard." *Id.* at 20a. They found it "irrational" to treat death row inmates differently "based solely on their particular sentence," *id.* at 22a, and saw no impediment to deposing former Attorney General Ashcroft "who, after all, chose to speak publicly about the rationale behind the media ban," *id.* at 23a.

Judge Wood wrote separately to highlight her "own concerns with the majority's opinion"—namely, that "the record does not support certain key assumptions made"; that further development of the record should have been permitted; and that the rule adopted by the majority "permit[s] wholesale censorship in prisons" "[t]o the extent that [it] has swept away the need to show adequate alternative avenues for communication." Pet. App. 23a-24a, 29a.

ARGUMENT

Petitioner contends (Pet. 11-29) that the ban on face-to-face interviews with the media violates prisoners' First Amendment and equal protection rights because the policy is a permanent ban that only applies to death row inmates housed at the SCU and, because all of those inmates are male, the policy discriminates on the basis of gender and sentence, and because the "true" motivation for the ban was to silence death-row inmates. The court of appeals' decision is correct and does not conflict with any decision of this Court. Petitioner's claimed conflict with other courts of appeals is overstated and would not result in a different outcome here. Further review is not warranted.

1. In a pair of decisions issued in 1974, *Pell* v. *Procunier*, 417 U.S. 817, and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, this Court held that prison policies barring

prisoners from face-to-face interviews with the media were consistent with the First Amendment. In *Pell*, the Court held that "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved," prisoners have no constitutional right to communicate with the media in person. 417 U.S. at 826; *id.* at 835-836 (Powell, J., dissenting) ("agree[ing] with the majority" that inmates do not "have a personal constitutional right to demand interviews with willing reporters").

In both cases, this Court explicitly endorsed the "jailhouse-celebrity" rationale. In *Pell*, the Court explained that allowing face-to-face interviews "had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems." *Pell*, 417 U.S. at 831-832. In *Washington Post*, the Court stated: "As a result those inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." 417 U.S. at 848-849.

And, in both cases, the Court relied on the availability of alternative means of communicating with the general public, and with the press. See *Pell*, 417 U.S. at 823-824 (noting other means for "communication with persons outside the prison, including representatives of the news media"); *Washington Post*, 417 U.S. at 847-848 (noting other avenues of press access to the prison); see also *Turner* v. *Safley*, 482 U.S. 78, 88 (1987) (observing

that *Pell* focused on whether "prisoners had other means of communicating with members of the general public"). Those alternatives included direct communication with the press by written correspondence, and limited visitation by designated categories of family and friends (who could, in turn, communicate with the press on the inmate's behalf). See *Pell*, 417 U.S. at 824-825; *Washington Post*, 417 U.S. at 846-847.

The same "jailhouse celebrity" concerns approved of in *Pell* and *Washington Post* prompted the policy at issue in this case. See C.A. Supp. App. 11. And the same alternative means of communicating with the general public and the press exist. See Pet. App. 105a-106a. Indeed, at Terre Haute, death-row inmates have access to monitored and unmonitored telephone calls with the media, a form of communication that was unavailable to the prisoners in the two earlier decisions.

Nothing has changed in this Court's prison jurisprudence in the past 35 years to put those holdings in doubt. To the contrary, this Court has repeatedly reaffirmed the decision and reasoning in *Pell*. See, *e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 132 (2003) (relying on analysis in *Pell*, which was "cited with approval in *Turner*"); *Thornburgh* v. *Abbott*, 490 U.S. 401, 409, 415 (1989) (citing *Pell* with approval); *Turner*, 482 U.S. at 86, 88, 90 (same). If anything, the subsequent cases have established a level of judicial deference to prison policies that is greater than the deference shown in *Pell* and *Washington Post*.

2. Nonetheless, petitioner faults the en banc court for applying this Court's controlling precedent in *Pell* and *Washington Post*, rather than the four-factor test announced in *Turner*. Pet. 23-24. Petitioner does not ask this Court to overrule its earlier cases, nor does he

suggest that the policies at issue in *Pell* and *Washington Post*—permanent rules barring face-to-face interviews—would fail under the *Turner* standard. Instead, petitioner seeks to distinguish THA-1480.05A from the policies upheld in those cases. Pet. 23-29. None of the supposed distinctions withstands scrutiny or warrants further review.

First, petitioner asserts (Pet. 13, 23-28) that the SCU policy applies only to a "sub-class of prisoners"—a subclass defined by gender and sentence.

As an initial matter, petitioner's claim that the media policy is invalid because it involves the "differential treatment" of men and women (Pet. 26; see Pet. 13, 25, 27) was never raised below at any stage of this litigation, and thus is not properly before the Court. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) (Court ordinarily will not consider issues neither raised nor resolved by the court of appeals.); *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988) (Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."). In any case, THA-1480.05A says nothing about gender; the policy barring face-to-face media interviews simply applies to Terre Haute SCU inmates sentenced to death, *i.e.*, the male death-row inmates currently in the BOP. An Institution Supplement, by definition, is limited to a particular institution. If a media-access policy were to cover the two female death-sentenced inmates in the federal system, it would have to be issued by the warden at the Federal Medical Center in Carswell, Texas, where they are housed. Petitioner's reasoning presumably would make any regulation issued by the SCU regarding

death row inmates invalid unless an identical regulation had issued at Carswell. That cannot be the law.[4]

Petitioner's claim that the policy is invalid because it applies only to death-row inmates housed at the SCU is equally without merit. By the time this Court decided *Washington Post*, the BOP had revised its policy to permit inmate interviews in minimum-security prisons, *i.e.*, treating a "sub-class" of prisoners differently than those at higher-security prisons. 417 U.S. at 844 & n.2. The Court expressed no concern with that distinction—and for good reason. The "principal reason for limiting press contacts is the maintenance of security," Pet. App. 4a, and there are different security needs at different institutions. *Id.* at 5a ("It is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the SCU at Terre Haute) than at all medium- and maximum-security prisons."); cf. *Turner*, 482 U.S. at 95 n.* (This Court's precedents "make clear * * * [that] the Constitution 'does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions,'" particularly when "different security concerns" are present.) (citation omitted). As the en banc court of appeals held, the BOP need not choose between the nationwide (or near-nationwide) ban upheld in *Washington Post*, and no limitation at all. See Pet. App. 5a.

Second, petitioner describes the prohibition on face-to-face interviews with the media as a "permanent ban,"

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[4] Indeed, under petitioner's reasoning, any policy established for an institution housing only men is potentially invalid. Respondents are informed that, as of September 9, 2009, 93.3% of the federal prison population was male. The remaining 6.7% who were female are housed separately.

and suggests that this "permanent ban" "squarely presents" a question left unresolved in *Beard* v. *Banks*, 548 U.S. 521, 536 (2006), and *Bazzetta*, 539 U.S. at 134. Pet. 13, 18, 23, 27-29. But petitioner concedes that numerous "permanent" bans have been upheld by this Court. See Pet. 27 (citing five decisions and conceding that "the Court has upheld 'permanent' restrictions that apply equally and neutrally to an entire prison population"). He argues only that such "permanent" bans cannot be applied to a "sub-class" of prisoners. *Ibid.* That is incorrect.

As discussed above, the Court in *Washington Post* already upheld a "permanent" ban on exactly this sort of media contact that applied only to a sub-class of prisoners. But, more fundamentally, the skepticism expressed in *Bazzetta* and reiterated in *Banks* is not implicated here. In *Bazzetta*, this Court observed that if a ban on "all visitation" for certain inmates was treated as "permanent," it might "reach a different conclusion in a challenge to a particular application of the regulation." 539 U.S. at 134. In *Banks*, the Court quoted that language and upheld a prison policy denying "newspapers, magazines, and photographs" to the "worst of the worst" inmates, where there was no alternative means of exercising that right. 548 U.S. at 524, 530.

Petitioner challenges the validity of a policy prohibiting all death row inmates at SCU from participating in face-to-face interviews with the media. That is not a permanent ban on all visitation, nor does it foreclose other avenues of expression. Inmates at SCU, like petitioner, are prohibited from engaging in one specific type of contact, an in-person interview, with one specific type of visitor, the media. They are free to contact the press through written correspondence or authorized telephone

calls, and to communicate with the general public through face-to-face visits with family and friends. That this more limited ban is "permanent" might be relevant to the *Turner* analysis, but it does not warrant a different inquiry or a different outcome here.

Third, petitioner claims (Pet. 24-25) that the policies at issue in *Pell* and *Washington Post* did not restrict an inmate's ability to communicate with the media through written correspondence, whereas petitioner could not discuss other inmates with the media. Petitioner does not dispute that there are other means for him to communicate with the general public and the press; he argues only that there are no reasonable means for him to communicate information *about other inmates* to the press. That argument lacks merit.

Petitioner fundamentally misunderstands the nature of the inquiry under the second prong of *Turner*, which asks "whether * * * alternative means of exercising the right * * * remain open to prison inmates." 482 U.S. at 90. *Abbott*, 490 U.S. at 417, makes clear that "'the right' in question must be viewed sensibly and expansively." Thus, the right in question here is the right to communicate with the general public. See *Pell*, 417 U.S. at 823 (examining the regulation "in the light of the alternative means of communication permitted under the regulations with persons outside the prison"); see *Abbott*, 490 U.S. at 417-418 (Court "held in *Turner* that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available, and in *O'Lone* [v. *Estate of Shabazz*, 482 U.S. 342 (1987)] if prisoners were permitted to participate in other Muslim religious ceremonies.") (citations omitted). Like the prisoners in *Washington Post* and *Pell*, petitioner retains that right.

Petitioner and amici also misunderstand the scope of THA-1480.05A and, in particular, Attachment A, which prohibits the media from "asking or discussing * * * any information regarding other federal or state inmates," and from "publishing such information." Pet. App. 110a.[5] That prohibition is directed solely at the media, and petitioner has no standing to challenge it. See *id.* at 73a. Moreover, as Warden Lappin explained, the regulation does "not affect the content of the interview," only the "end result." C.A. Supp. App. 12. "If the news media representative wished to include information about another inmate in his or her article, an interview with that inmate could be requested." *Ibid.*

Thus, the court of appeals correctly rejected petitioner's proposed distinctions and applied this Court's controlling precedents in *Pell* and *Washington Post* to uphold the challenged regulation. That decision does not conflict with any other court of appeals' decision and this Court's review is not warranted.

3. a. Petitioner next contends (Pet. 11-23) that further review is needed because the en banc decision misapplied the first *Turner* factor by accepting an allegedly post-hoc security justification for the policy, instead of the "admit[ted]" goal of suppressing speech, Pet. 16, as spelled out in a press conference by then-Attorney General Ashcroft. That contention is mistaken.[6]

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[5] To the extent petitioner's challenge rests on letters written by the Warden before THA-1480.05A was announced, those claims are case- and fact-specific and do not warrant further review.

[6] Petitioner does not suggest any nefarious motive underlying the restriction precluding the *media* from publishing information about other inmates. Pet. App. 110a-111a. As stated in Attachment A to THA-1480.05A, that restriction was issued to "maintain the safety, security and good order of the SCU," to protect "the privacy interests

The first *Turner* factor asks whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (citation omitted). In considering whether the penological goal "put forward" by prison officials is rationally connected to the policy, the court must ensure that the goal is "legitimate and neutral." *Id.* at 90. In this context, a goal is "neutral" as long as it "further[s] an important or substantial governmental interest unrelated to the suppression of expression." *Abbott*, 490 U.S. at 415 (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974)).

Petitioner argues that even though *Turner* and its progeny made clear that courts must "accord substantial deference to the professional judgment of prison administrators," Pet. 16 (quoting *Bazzetta*, 539 U.S. at 132), those cases "did not consider whether such deference must be given to non-contemporaneous explanations offered only in litigation declarations authored by lawyers long after the fact," *ibid.*[7] But this is not a case of post-hoc justifications offered by government lawyers in the course of litigation.

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of the other inmate[s]," and to prevent "a reaction that could threaten the safety, security, or good order of the institution." *Ibid*; see C.A. Supp. App. 12 ("real or imagined slights, insults or provocations can cause inmate on inmate violence that can have dire consequences for inmates, staff members, and the public safety").

[7] See also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison.") (citation omitted). This deference is particularly appropriate when a challenged policy governs the most violent and dangerous prisoners. *Lewis* v. *Casey*, 518 U.S. 343, 361 (1996).

The security of our nation's prisons is indisputably a legitimate and content-neutral goal. And, contrary to petitioner's suggestions, that rationale was contemporaneously "put forward," *Turner*, 482 U.S. at 89, to justify THA-1480.05A. The Institution Supplement itself, which petitioner ignores, explains that the ban on in-person interviews was enacted "[t]o maintain safety, security and the good order of the SCU." See Pet. App. 105a. Elaborating on that reason, Warden Lappin explained in a sworn declaration that prison officials were concerned that inmates would gain "special status" through media exposure, and that this threatened prison security because an inmate with greater status can become a "jail celebrit[y]" who is an "authority figure to other inmates" and can "compete with staff members for influence over the inmate population." C.A. Supp. App. 11. This Court has relied on "justifications" set forth "in [a summary judgment] motion" and accompanying affidavit of a prison official as "evidence." See *Banks*, 548 U.S. at 530. And these are the same reasons "put forward" by prison officials, and accepted by this Court, in *Pell* and *Washington Post*. See p. 12, *supra*.

Petitioner next contends that the en banc court erred in failing to credit his allegation that Warden Lappin was lying, and that the true motivation underlying the policy was then-Attorney General Ashcroft's "personal view[s]" and his desire "to restrict a mass murderer's access to the public podium" and "to prevent the 'irresponsible glamorization of a culture of violence.'" Pet. 2-3 (quoting Pet. App. 90a); see also Pet. 7. That argument is equally misplaced.

Turner's first factor does not provide for consideration of the subjective motivation of a particular prison official or law enforcement officer. *Turner* speaks of the

goal or interest "put forward" by prison officials; it does not suggest that courts may question the sincerity of an admittedly legitimate and neutral penological goal. Indeed, when this Court rejected the *Turner* test for race-based prison policies, it expressed a concern that the analysis under *Turner* might allow segregation "if prison officials *simply asserted* that it was necessary to prison management." *Johnson* v. *California*, 543 U.S. 499, 514 (2005) (emphasis added); see *id.* at 513, 514 (*Turner* is not designed to "ferret out invidious uses of race"; application of *Turner* standard "would make rank discrimination too easy to defend"); see also *Waterman* v. *Farmer*, 183 F.3d 208, 214 (3d Cir. 1999) (assuming that the legislative goal behind the statute was rehabilitation and rejecting the district court's contrary assumption, which had been based on the lack of legislative history and the state corrections department's opposition to the statute).

Eschewing inquiries into subjective motivation is consistent with rational basis review in the equal protection context. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). And courts have often equated *Turner*'s first factor with a rational basis standard. See, *e.g.*, *Amatel* v. *Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), cert. denied, 527 U.S. 1035 (1999); *Waterman*, 183 F.3d at 215; *Mauro* v. *Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000). Far from permitting courts to order discovery into a former Attorney General's subjective motivation, the first factor of *Turner* and its rational-

basis principles require courts to accept the goal "put forward" by prison officials, and to consider the rationality of the connection between the policy and that goal.

A contrary approach would significantly undermine the intent of *Turner*—to give prison officials the ability to operate and manage prisons without undue judicial interference. As even the panel recognized below, prisoners are resourceful litigators who have little trouble alleging evidence of malfeasance, Pet. App. 45a, and when subjective motivation becomes an issue, it will be difficult to weed out baseless claims before trial. See *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) ("Because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.").

Respondents are, of course, sensitive to the possibility that in an unusual case a prison official might misrepresent the penological goal behind the challenged policy during litigation. But that issue is readily dealt with under *Turner*, which objectively looks at whether the connection between the policy and the penological goal put forward by prison officials is rational and whether the policy represents an exaggerated response to the problem. 482 U.S. at 89-91. A penological goal falsely put forward to cover up the true, improper motivation for a policy is unlikely to have a rational connection to the policy or to be a reasonable response to the problem. For example, in *Turner* itself the Court held that common sense suggested there was no rational relationship between the prohibition of marriages and the purported security rationale of preventing "love triangles," and that the prohibition was an exaggerated response to

security concerns that could have been addressed with a more limited restriction. *Id.* at 98; see also *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 366 n.4 (2001) (explaining that policies have been struck down within the rational basis framework when the "purported justifications" did not make "sense in light" of the treatment of "similarly situated" groups). The first and fourth factors of *Turner* are designed to uncover many, if not all, of those questionable cases. This is not one of them.

b. Petitioner also argues (Pet. 12, 18-20) that the court of appeals' decision conflicts with other circuits, which hold that the legitimacy of prison regulations "must be measured by reasons that were put forth at the time the policy was adopted." In asserting a conflict between the en banc court here and other courts of appeals, petitioner relies on language in those cases but overstates their holdings. And this case presents an unsuitable vehicle to address any purported conflict because the outcome would remain the same.

In *Salahuddin* v. *Goord*, 467 F.3d 263, 275 (2d Cir. 2006) (cited at Pet. 18-19), the court stated that prison officials need only satisfy the "limited burden" of "identifying" the penological goal. The actual holding there was that the reasons for the policy had to be *in the record* to satisfy the government's summary judgment burden, *id.* at 277 ("Post hoc justifications with no record support will not suffice.")—not that the court may question what those reasons really are. Here, the security justification for the Institution Supplement was in the record. See p. 20, *supra*.

In *Abu-Jamal* v. *Price*, 154 F.3d 128, 134, 137 (3d Cir. 1998) (cited at Pet. 19), the plaintiff raised an as-applied challenge asserting that prison officials were

enforcing a rule against him "because of the content" of his writing, and that the rule was not being enforced against other similarly situated inmates engaged in the same activity. The prison officials offered only the vaguest of justifications for their rule. *Id.* at 134 (rule "justified by 'multifarious purposes and the impossibility of accommodating the practice of a profession or business in a penal setting'") (citation omitted). And one of the justifications—compensation—was plainly irrelevant to the case. *Ibid.* ("under the Department's own regulations, compensation is irrelevant in these circumstances"). Likewise, in *Quinn* v. *Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (cited at Pet. 20), the challenge was as-applied and the prison officials' assertion that they had required the plaintiff-prisoners to have their hair cut out of concern for gang-related hair was implausible on its face, since they received the memorandum warning about gang hair *after* they had ordered the haircuts. Here, petitioner challenges a rule that is applied equally to all death row inmates at the SCU, and prison officials offered a contemporaneous and facially valid justification for that rule.

Finally, *Walker* v. *Sumner*, 917 F.2d 382, 385-386 (9th Cir. 1990) (cited at Pet. 20), required "evidence" supporting the interest "put forward" by prison officials. There, "[t]he only attempted justification" was a "bare and unsupported assertion in their *motion*"; there was no evidence "either in the form of deposition testimony or affidavits to justify their policy." *Id.* at 386-387 (emphasis added). In contrast, here the interest was codi-

fied in the policy itself and supported by the declaration of Warden Lappin—"evidence" by any standard.[8]

* * * * *

In the end, contrary to petitioner's and amici's concerns, nothing about this policy prevents death row inmates, like petitioner, from speaking to the press about "the administration of the death penalty" or "the proper treatment of prisoners," or deprives the general public of "access to accurate information about the conditions inside prisons." See, *e.g.*, Pet. 21-22; National Lawyers Guild Amicus Br. 3. Petitioner does not (and could not) claim that the policy was motivated by a desire to conceal prison conditions or details concerning administration of the death penalty. Cf. *Pell*, 417 U.S. at 830 (noting that the regulation was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions"); *Washington Post*, 417 U.S. at 848 (examining the alternative means of communication and finding it "[t]hus * * * clear that [the policy was] not part of any attempt by the [BOP] to conceal from the public the conditions prevailing in federal prisons"). THA-1480.05A simply prohibits death row inmates at the SCU

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[8] Moreover, *Walker* has been substantially narrowed by the Ninth Circuit. See *Frost* v. *Symington*, 197 F.3d 348, 355 (1999) (en banc decision in *Mauro* v. *Arpaio*, *supra*, "appears to have implicitly called [*Walker*'s] underpinnings into question"); *ibid.* (explaining that *Mauro* "ruled that as a matter of law the prison's purported motivations were legitimate"). *Frost* reconciled *Mauro* and *Walker* by limiting *Walker* to cases involving the rationality of the policy, as opposed to the goal itself—that is, to cases in which the inmate produces evidence tending to refute a common-sense relationship between the goal and the policy. It is doubtful that the snippet of *Walker* that petitioner quotes is still good law in the Ninth Circuit.

from speaking to the press *in person* about such matters. A far more expansive prohibition was countenanced by this Court more than thirty years ago in *Washington Post* and in *Pell*, and nothing about the present case warrants this Court to revisit those decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

DAVID PAUL HAMMER,
Petitioner,

v.

JOHN D. ASHCROFT, HARLEY G. LAPPIN, KATHLEEN HAWK-SAWYER, and KEITH OLSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Contrary to Respondents' assertions (Opp. 11-18), the *en banc* majority decision does not faithfully follow this Court's prior decisions; it directly conflicts with several of those decisions, most notably *Turner v. Safley*, 482 U.S. 78 (1987). The decision below also conflicts with numerous decisions from other federal appellate courts addressing inmate challenges to unconstitutional prison restrictions.

On an issue of fundamental First Amendment import, the court below substituted judicial abdication for deference. The court did not just provide a means to "weed out baseless claims before trial," as Respondents assert (Opp. 22), but effectively put all First Amendment violations in the prison context beyond redress.

Here, Mr. Hammer, a *pro se* plaintiff who was prevented from taking any discovery, nonetheless offered substantial evidence concerning Respondents' real reasons for the ban, including Attorney General Ashcroft's own explanation, made just four days before the adoption of THA-1480.05A:

> I want to restrict a mass murderer's access to the public podium. . . . I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. . . . I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

(App. 90a, 97a). Neither this Court nor any other federal appellate court has previously countenanced ignoring such contemporaneous statements of administrative reasons — the hallmark of administrative justice in a democratic society. Nor has any prior decision held that First Amendment rights are adequately protected whenever prison officials — or a reviewing court — can "imagine" a possible justification for their curtailment after the fact. Indeed, such an approach is inconsistent with *Turner*'s first factor, which requires that the "governmental objective" served by such a restriction "must be a legitimate and neutral one." *Turner*, 482 at 90. Clearly, such a "legitimate and neutral" objective must be rooted in reality, not in imagination.

Respondents concede that the decision below undertakes no *Turner* analysis (Opp. 13-18) and directly conflicts with numerous federal appellate decisions. (Opp. 11, 23). Respondents also expressly admit "the possibility that in an unusual case a prison official might misrepresent the penological goal behind the challenged policy during litigation." (Opp. 22). But Respondents do not explain why the Court should ignore that reality and pretend that First Amendment rights are well-protected by a form of judicial review that takes no account of contemporaneous reasons and puts its faith in reasons that may be imagined by administrators or courts after the fact. Instead, Respondents downplay the Seventh Circuit majority's abandonment of *Turner* and its ratification of an exclusive and

permanent First Amendment restriction on male death row inmates. Respondents state that the decision below "does not conflict with any decision of this Court," but that is incorrect. Respondents do not even claim that the decision below does not conflict with other federal appellate decisions, but simply assert that the "conflict with other courts of appeals is overstated." (Opp. 11). That assertion also is incorrect.

The majority decision below seriously conflicts with prior decisions of this Court and with the decisions of other courts of appeals on an important question of federal constitutional law and therefore warrants review by this Court.

I. The Divided, *En Banc* Seventh Circuit's Decision Is Inconsistent With Prior Decisions Of This Court.

Respondents concede (Opp. 13-14) that the majority decision below did not apply "the four-factor test announced in *Turner*," but contend that review is not warranted because the decision below correctly "appl[ied] this Court's controlling precedent in *Pell* [*v. Procunier*, 417 U.S. 817 (1974),] and [*Saxbe v.*] *Washington Post* [*Co.*, 417 U.S. 843 (1974)]."

Respondents' argument is incorrect. *Turner*'s four-factor analysis provides the controlling law for evaluating prison restrictions that impinge on constitutional rights; it is not simply an alternative mode of analysis that federal courts can choose to use or disregard at their own discretion. This Court

has made that clear on numerous occasions. *See, e.g., Beard v. Banks*, 548 U.S. 521, 528 (2006) (*Turner* "contain[s] the basic substantive legal standards governing" an inmate's challenge to restriction on periodicals for recalcitrant prisoners); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (*Turner*'s four-factor test is proper method of "deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge").[1]

If Turner is to be relegated to the status of an alternative method of analysis, that is a matter for this Court to decide, not the Seventh Circuit or Respondents.

Furthermore, as both Judge Rovner and Judge Wood noted in dissent, nothing in *Pell* or *Washington Post* supports THA-1480.05A's exclusive and total ban on face-to-face press interviews with male death row inmates. (App. 22a, 24a, 28a-29a).[2] While

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[1] As we have shown (Pet. 23-29), triable issues exist with respect to each of the four *Turner* factors. 482 U.S. at 89-91.

[2] It is undisputed that THA-1480.05A applies exclusively to male death row inmates. (App. 35a, 105a). Respondents argue that the gender-based differential treatment issue "was never raised below at any stage of this litigation and thus is not properly before the court." (Opp. 14). In fact, Mr. Hammer has consistently argued that the ban violates his right to equal protection (see 7th Cir. J.A. at 26-40), and Mr. Himmelfarb, one of Respondents' attorneys, was specifically asked about the gender-based differential treatment under THA-1480.05A during the Seventh Circuit *en banc* argument:

Respondents correctly note that this Court "explicitly endorsed the 'jailhouse-celebrity' rationale" in *Pell* and *Washington Post* (Opp.12), there was no dispute in those cases (unlike here) as to the actual reasons for the prison officials' actions. *Pell*, 417 at 827, 830 (noting "the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these [security] considerations" and that "this regulation is not part of an attempt by the State to conceal the investigation and reporting of [prison] conditions"); *Washington Post*, 417 U.S. at 848 (noting that restriction was "not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons" and that it was "motivated by the same disciplinary and administrative considerations that underlie" the policy in *Pell*).

Respondents also suggest that the decision below as a matter of policy represents an improvement upon *Turner*. According to Respondents, "prisoners are resourceful litigators who have little trouble alleging evidence of malfeasance," and the decision below allows courts to "weed out baseless claims before trial." (Opp. 22). But the decision below

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Question: "Do the same rules apply wherever the women [federal death row inmates] are?"

Mr. Himmelfarb: "No, this is a special rule that only applies to [the male death row inmates] in Terre Haute."

See http://www.ca7.uscourts.gov/tmp/V20HL7RM.mp3 (last visited on Feb. 9, 2010).

precludes all such actions, not just those that are "baseless." Thus, Respondents' "policy argument" contradicts this Court's holding in *Turner*, which required federal courts to "discharge their duty to protect constitutional rights" of inmates when "a prison regulation or practice offends a fundamental constitutional guarantee." *Turner*, 482 U.S. at 84. *Turner* does not permit courts to accept *post hoc* or "imagined" security justifications in the face of direct evidence of an unconstitutional purpose. The Seventh Circuit disregarded its obligations under *Turner* by ignoring Mr. Hammer's evidentiary showing that THA-1480.05A was adopted for an unconstitutional, content-based purpose. (App. 90a, 97a).

II. The Conflict Between The Decision Below And Holdings Of Other Federal Appellate Courts Is Substantial.

Respondents further contend that the conflict between the Seventh Circuit's decision and decisions of other federal appellate courts is "overstated" (Opp. 11). This argument is disingenuous. As we have previously noted (Pet. 17-23), the Seventh Circuit held that prison officials do not need to be pursuing a legitimate penological interest when they adopt their policy, so long as a "rational basis for [the policy] could be imagined. . . . It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 5a, 10a).

This holding conflicts with the holdings in *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), and *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990). In each of those cases, other courts of appeals made clear that *Turner* requires real, not imagined, penological interests. *Salahuddin*, 467 F.3d at 277 ("[T]he Supreme Court requires the government to close the circle -- prison officials must have been pursuing the interest in inmate safety when" adopting a restriction, in order to "ensure[ ] that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity"); *Abu-Jamal*, 154 F.3d at 134 ("[I]t is likely that Jamal can demonstrate that the Department's enforcement of the business and profession rule against him was motivated, at least in part, by the content of his articles and mounting public pressure to do something about them, and hence, the actions were not content neutral as required by *Turner*"); *Quinn*, 983 F.2d at 118-19 ("[P]rison officials in this case were not motivated by the legitimate interests they assert" because "the officials' proffered justification for their actions was pretextual"); *Walker*, 917 F.2d at 385-87 (summary judgment for prison officials was inappropriate where it was unclear that "the interest proffered is the reason why the regulation was adopted or enforced"). Or, as the District of Columbia Circuit has noted, "even if [prison officials] provide an objectively valid reason for their actions . . . the District Court must still inquire into whether there is a disputed issue of fact

as to whether [the prison officials] were actually motivated by an illegitimate purpose." *Kimberlin v. Quinlan*, 199 F.3d 496, 503 (D.C. Cir. 1999).

The Seventh Circuit's decision would allow prison officials to preclude all inquiry into whether a prison First Amendment restriction was adopted for a "legitimate penological purpose" -- either by providing a *post-hoc*, litigation affidavit, or because such a purpose could be "imagined." (App. 5a, 10a). Neither *Salahuddin*, *Abu-Jamal*, *Quinn*, *Walker*, nor *Kimberlin* authorizes the granting of summary judgment for prison officials when a prisoner is able to offer evidence showing that the proffered *post-hoc* penological interest was pretextual; to the contrary, those cases hold that prison officials must have been motivated by a legitimate purpose at the time they adopted a restriction. *Salahuddin*, 467 F.3d at 277; *Abu-Jamal*, 154 F.3d at 134; *Quinn*, 983 F.2d at 118-19; *Walker*, 917 F.2d at 385-87; *Kimberlin*, 199 F.3d at 503.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER,

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE JOHN HOWARD ASSOCIATION OF ILLINOIS, THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND THE UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONER

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Interest of Amici[1]

The John Howard Association of Illinois

The John Howard Association of Illinois has an over 100-year history of monitoring prisons in Illinois, advocating for the fair and effective treatment of prisoners and for sentencing reform that serves the dual purposes of punishment and rehabilitation.

This case concerns an issue of interest to our organization and the other *amici* as it addresses a prisoner's ability to inform the public, policymakers and corrections official of prison abuses and valuable information helpful in implementing better corrections and sentencing policy, and potentially inform us of ways to prevent crime from occurring in the future.

The National Police Accountability Project

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild (NLG) to combat misconduct by police officers, prison guards and other law enforcement officers. The project presently has more

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[1] Pursuant to Supreme Court Rule 37, counsel for the *amicus curiae* declares that she has authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief ; and that written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk.

than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as *amicus curiae* in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

The Uptown People's Law Center

The Uptown People's Law Center ("UPLC") is a not-for-profit legal services center serving poor and working people in Chicago, Illinois. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters. UPLC receives over 5,000 requests for representation every year, and has one of the largest dockets of prison cases in Illinois. UPLC files cases, and provides advice to prisoners litigating their own cases, in both federal and state courts. UPLC has a vital interest in ensuring that prisoners retain access to the press to expose the unlawful conduct of prison officials. UPLC has regularly challenged restrictions on prisoners' communications with those outside prison, including the press.

Summary of Argument

Prisoners lose myriad rights when they are incarcerated. But they don't lose all of them. They should not lose the right to talk to the press simply because a government official has an objection to the content of the prisoner's speech, and has a desire to suppress the message the prisoner wishes to convey.

Yet, the decision below makes it impossible for reporters to conduct face-to-face interviews with federal death row inmates simply because of the mere potential that the prisoner may say something the government finds offensive. It also forbids federal death row prisoners from communicating to the media any information about other prisoners. This is the epitome of censorship on free speech which impinges on a prisoner's first amendment rights. At best, the policy in question, and the decision below are overly broad and restrict not only potentially harmful speech, but also potentially helpful speech. At worst, the policy and decision below unconstitutionally muzzle prisoners on the basis of one condemned terrorist's actions. It is yet another example of an over inclusive government policy based upon the worst case.

This restriction severely curtails the media from being able to investigate abuses or miscarriages of justice on death row. It also inhibits transparency into a billion dollar taxpayer expenditure. The policy and decision below ignore the recommendation of the national Commission on Safety and Abuse in America's prisons which recommends that press

access be allowed in prisons specifically for the purposes of transparency and oversight.

Finally, the policy and opinion below assume that all prisoners on the federal death row are incorrigible, or likely to say things the government finds offensive. Muzzling free speech because the speech could be unfavorable limits the possibilities for prisoners to contribute useful information to the public, victims, law enforcement or policymakers.

The rationale for limiting the speech is not based on a legitimate penological interest, but rather on an opinion that the language could potentially be offensive. This is not constitutionally permissible. For these reasons, *amici* respectfully request that this Court grant David Hammer's Petition for Certiorari.

Argument

I. Prisoners' access to media is essential to uncovering instances of prisoner abuse, mistreatment and other miscarriages of justice.

Prisoner access to media is a critical component of ensuring prison safety and revealing prison and prisoner abuses, poor treatment in prison and miscarriages of justice. Some of the most notorious prison abuses have come to light because government officials permitted reporters to visit and interview prisoners at institutions[2]. Indeed, many positive prison reform initiatives result from news reports about prison abuses[3].

It is well-settled that prisoners may lose some of their constitutional rights simply by virtue of their imprisonment. *Turner v. Safely*, 482 U.S. 78, 89 (1987). However, this Court has held that any prison rule that restricts a prisoner's constitutional rights must be "reasonably related to legitimate penological interests." *Id.* at 84-85. The policy at issue in this case prohibits federal death row prisoners from

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[2] Loretta Tofani, *Terror Behind Bars: Most Victims of the Sexual Attacks are Legally Innocent*, THE WASHINGTON POST, Sept. 26, 1982; Loretta Tofani, *Improved Conditions Reduce Assaults in P.G. Jail*, THE WASHINGTON POST, Dec. 31, 1982; Loretta Tofani and Tom Vesey, *Seven are Indicted in Sexual Assaults at Prince George's Jail*, THE WASHINGTON POST, Jan. 14, 1983.

[3] Ken Armstrong and Steve Mills, *The Failure of the Death Penalty in Illinois*, November 14-18, 2009, THE CHICAGO TRIBUNE; Gary Marx, *Inmate Death Triggers Reform*, THE CHICAGO TRIBUNE, August 28, 2009.

having face-to-face interviews with the press and from communicating to the press, in writing, in person or on the phone, any information about another inmate. The motivation for the policy is to mute free speech the government might find offensive. This is an unconstitutional abridgement of inmates' First Amendment rights.

Two issues are of concern. The first is the policy that forbids prisoners from talking about any other prisoners to a member of the press. It is true that this Court has in the past upheld restrictions on an inmate's ability to communicate with the media. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), *Pell v. Procunier*, 417 U.S. 817 (1974). But in those instances, other, alternative means of communicating with the media were available to the prisoners.

Here, the rule forbidding prisoners to talk to the press about another inmate provides no uncensored way for prisoners to convey information to the press. As Judge Easterbrook noted below, " [a] system of rules that permitted prison administrators to conceal beatings of starvation of prisoners, violations of statutes and regulations and other misconduct would be intolerable." (See App. A 13a)[4] Yet, in this case, the rules create exactly that situation for federal death-row inmates.

Although Judge Easterbrook stated below that "as far we can tell, this rule applies to interviews (in

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[4] All citations ending in "a" are to the Appendix filed by Petitioner.

person or by telephone) but not to correspondence," Judges Rovner and Wood note in their separate dissents, that the government conceded that "death-row inmates are not allowed – through any method of communication to discuss other inmates with members of the media." (See App., 13a, 19a-20a) Thus, the current policy creates exactly the "intolerable" system of rules Judge Easterbrook described. Inmates have no way of communicating anything about another inmate, even allegations of prison abuse, to the media.

The second issue of concern is the policy prohibiting face-to-face interviews with federal death row prisoners and the press. Face-to-face interviews with media provide reporters with an opportunity to observe a prisoner who may allege an injury or deficiency in medical care and also enable reporters to develop relationships where they can better determine a prisoner's credibility.

In 2005, for example, Wall Street Journal Reporter Gary Fields, visited Gerald Johnson, a terminally ill prisoner at the Menard Correctional Center in Illinois for a story about the growing population of terminally ill prisoners. He opened the story by describing what he saw when he visited Mr. Johnson, stating:

> Gerald Johnson rests on a wooden desk that he built when he was stronger. His piercing eyes -- the color of his prison-issue blue shirt -- are one of the few reminders of the young criminal incarcerated in 1977 for participating in the murder of a prison guard. His cheeks

> are sunken and Mr. Johnson's bald head gives his 128-pound frame a gnome-like appearance. White gauze, spotted with blood, is taped to his forearm where an intravenous tube delivers chemicals to fight the cancer in his throat." Gary Fields, *Terminally Ill Raises Tough Questions*, THE WALL STREET JOURNAL, September 29, 2005.

This reporter was able to convey a much more accurate description of the prisoner and his medical condition than he would have if he and Mr. Johnson had simply corresponded through the mail or the telephone.

And in 1999, the Chicago Tribune published an investigative series about how the death penalty was administered in Illinois[5]. The reporters corresponded with and visited with several condemned inmates, and uncovered stories of horrific police and prosecutorial misconduct resulting in several wrongful convictions. The series ultimately led to a statewide moratorium on executions and 17 exonerations. The state legislature responded by enacting meaningful reforms[6].

The face-to-face visit is also important for prisoners who may find it difficult to talk about any abuse they suffer in prison. Earlier this year, the

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[5] Ken Armstrong and Steve Mills, *The Failure of the Death Penalty in Illinois*, THE CHICAGO TRIBUNE, November 14 – 18, 2009.

[6] Jodi Wilgoren, *Panel in Illinois Seeks to Reform Death Sentence*, THE NEW YORK TIMES, April 15, 2002.

Department of Justice Office of the Inspector General issued a report on sexual abuse in prisons[7]. Like many states, the Federal government recognizes in cases of custodial sexual misconduct, "consent by a prisoner is never a legal defense because of the inherently unequal positions of prisoners and correctional and law enforcement staff who control many aspects of prisoners' lives." *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates*, September 2009, Report Number I-2009-004, at page 1.

Thus, the inherent relationship between prisoners and officers or other prison staff is one which makes it difficult for prisoners, who are by definition subordinate, to communicate abuses to others. It is even less likely that a prisoner would communicate evidence or information of abuse through the mail subject to review by the alleged abusers, or through a phone call monitored by the alleged abusers. It is only in a face-to-face communication where the fear of someone intercepting the message is alleviated.

In addition, face-to-face meetings engender trust and enable reporters to better determine credibility by observing eye contact, listening for intonation and observing body language. Trust is particularly important in situations of abuse generally, but even more so in situations of abuse

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[7] The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates, September 2009 Report Number I-2009-004, available at http://www.justice.gov/oig/reports/plus/e0904.pdf

where the abuser remains in control of everything, including communication.

II. A national, bi-partisan commission charged with studying safety and abuse in America's prisons finds press access to prisoners a key recommendation for preventing prisoner abuse and enhancing prison safety.

In 2006, a bi-partisan group of judges, lawyers, policymakers, law enforcement officials, professionals, and advocates created the National Commission on Safety and Abuse in America's Prisons (The Commission)[8]. The Commission's sole task was to investigate, over the course of a year, and through public hearings, safety and abuse in American prisons. It held four hearings in different parts of the nation, one of which focused exclusively on the issues of accountability, oversight and transparency.

The Commission's report made several findings. Key amongst them was the need for transparency, oversight and accountability in the prisons. Specifically, the report recommends that governments should "strive for transparency" and "[e]nsure media access to facilities, to prisoners, and to correctional data." *Confronting Confinement: A Report on Safety and Abuse in America's Prisons,* p.16. In support, the Commissioners write that,

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[8] John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, June 2006 (available at www.prisoncommission.org)

"...every prison and jail should allow the press to do its job." *Id.* The current BOP policy instituted by then-Attorney General Ashcroft ignores this recommendation. Instead, it expressly inhibits a prisoner's ability to report abuse of prisoners by other prisoners or officers.

In fact, the current policy makes it impossible for a member of the press to observe a federal death row prisoner at all. Personal observation is critical to describing circumstances and conveying a story to the public. It is also essential to describing injuries. It is, after all, one thing to receive a letter from a prisoner complaining of a beating. It is quite another to actually observe whether any injuries exist and document what they look like.

Furthermore, incarceration takes a toll on inmate relationships with family and friends who could otherwise be advocates in instances of abuse, poor treatment or miscarriages of justice. In some instances, prisoners do not have any friends and family on whom to rely.

Because of the remoteness of prisons, families and friends of prisoners, especially those with long or terminal sentences, are less likely to visit. The remoteness is only exacerbated by the fact that the vast majority of prisoners and their families are impoverished, and thus unlikely to keep in touch via the telephone. It is axiomatic that visits from family and friends, and on occasion, attorneys and journalists, actually contribute to a safer prison environment. Thus, the lack of social interaction for

prisoners in remote locations enhances the need for transparency and oversight.

Finally, a great percentage of prisoners come to prison with little or no education. They may thus be inhibited from communicating effectively any complaints of abuse in writing, and perhaps even through a 15-minute phone conversation.

III. The current policy expressly suppresses speech based on anticipated offensive content, and is over inclusive. The policy and the decision below also assume that the prisoners who sit on the federal death row are both the most "incorrigible" prisoners and are most likely to espouse statements through the press that glorify their criminal status.

In the decision below, judge Easterbrook states that "[i]t is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the Special Confinement Unit at Terra Haute) than at all medium- and maximum-security prisons." (See App., 5a) Yet, this assumption is flawed. Prisoners housed on Federal Death Row are at the Special Confinement Unit because that is where the BOP has designated the condemned unit will be. They are housed there regardless of their behavior. The fact that they have committed crimes for which they were sentenced to death is separate from an assessment of their prison behavioral record. Mere placement at the SCU because one is a death row inmate is not indicative of the security threat posed by any particular inmate. Corrections experts agree

that some prisoners who have committed the most egregious crimes can be the most well-behaved prisoners, and vice versa[9].

Secondly, the policy is over inclusive, and assumes that Timothy McVeigh's behavior, which was the impetus for then-Attorney General Ashcroft's policy announcement, is indicative of all death row prisoners' behavior. This is not the case. As is noted in the decision below, Hammer wishes to have access to the media to discuss prison conditions and other issues, but not to promote murder.

But even if it was the case that death row prisoners wanted to say something the government deems offensive, instituting a policy that would prohibit them from saying something on the basis that it would be offensive, is not constitutional. Our First Amendment is the hallmark of our freedom and guarantees even those who have ugly things to say the right to say them. Prison administrators can only curtail free speech if the motivation behind it is reasonably related to a legitimate penological interest. *Turner,* 482 U.S. at 84-85. As Judge Rovner stated in the decision below, "[s]uppressing speech because government officials find the content offensive is not a legitimate penological interest." (See App. 15a) This court has wisely given great deference to prison officials, who possess a unique expertise in how to handle prisoners and maintain safe and secure prisons. *Procunier v. Martinez*, 416 U.S. 396, 405-406 (1974); *Turner*, 482 U.S. at 84-85.

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[9] Ira J. Silverman, *Corrections, a Comprehensive View*, Second Edition, 2001, p. 147.

In this case, however, the right the government seeks to abridge is based on content, a rationale this Court should not accept.

IV. The current policy cuts off valuable communication that can be used to inform people invested in justice with information about why people commit certain crimes and what, if anything, works to rehabilitate people. Crime prevention.

The reason behind the ban in the current policy is that terrorists or serial killers should not be allowed a podium in which to express their beliefs, beliefs many of us may find offensive. This Court's jurisprudence reveals a strong adherence to knocking down government censorship of free speech based solely on content. In this case, the censorship is even more egregious because it could prevent prisoners from articulating serious prison abuses. However, another important policy reason to find the ban unconstitutional should inform the court.

While it may be true that in some cases, prisoners enjoy celebrity-style media attention, it is equally true that in other cases, prisoners may have something constructive to offer. They may have something to offer victims, social scientists and law enforcement officials that help inform us about what leads one to commit heinous, atrocious acts. They may provide some semblance of closure for victims through the media, in a way they are not otherwise able to. For example, a prisoner might express to a reporter that he or she is remorseful and express

some explanation for his actions but be prohibited from directly contacting the victim or victim's family.

Victims families have expressed a desire to hear from those who cause them and their families harm. In November 2009, John Allen Muhammad, better known as the DC Sniper, was executed without ever saying a word to the media about his crimes. He did not seek out media interviews, and he said nothing immediately preceding his execution. Some of the victims' family members noted their disappointment that Mr. Muhammad died quietly, lamenting that he never took responsibility, explained why he killed or showed remorse. Dena Potter, *Silent DC Sniper Mastermind Muhammad Executed*, THE CHARLOTTE OBSERVER, November 10, 2009.

Media access to prisoners may also better inform policymakers and the public about how to implement more effective laws. Perhaps it is the public's best interest to have a greater understanding of why people commit crimes. It is well-accepted that after time, prisoners go through a sort of "criminal menopause" in which they mature and reflect on their actions. They are often helpful in explaining what lead them to make the choices they made. By curtailing their ability to speak based upon a fear that all prisoners may say something a government official finds offensive limits prisoners from providing us with helpful information.

Conclusion

Prison abuse is a serious issue. Access to the press can be critical to revealing prison abuses, miscarriages of justice and other types of mistreatment of prisoners. The sheer nature of prisons – banishment to a place out of sight and out of mind, and prioritizing security, make transparency more difficult. But it is no less important.

Reporters are in a unique position to ask prisoners, "why?" They are disinterested advocates of information. The stories journalists ultimately produce arm the public, policymakers, law enforcement officials and the judiciary with information which guides us in administering justice and informing the public. The ability to physically observe someone is critical to gauging credibility, observing features to convey the story better and provide oversight of the prison environment.

Perhaps most importantly, prisoners should not be muzzled because the government dislikes what they may say. Absent a reasonable relation to a legitimate penological interest, this Court cannot allow Hammer's first amendment rights, or those of other death row inmates, to be abridged because of the content of their speech.

Therefore, *amici* respectfully request that the Court accept review of the decision below.

Respectfully submitted,

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DAVID PAUL HAMMER,
Petitioner,

v.

JOHN D. ASHCROFT, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER

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SUMMARY OF ARGUMENT[1]

Proscription of in-person communication between death row inmates and members of the press is an affront to the First Amendment of the U.S. Constitution where, as here, the proscription is based either on the anticipation that the speech will be offensive to government officials or on a generalized desire to keep certain viewpoints out of the public discourse. The Bureau of Prisons' interest in preserving security within the penal system does not permit it to censor speech absent a legitimate concern requiring the restriction of this fundamental right to free speech and free association.

The speech silenced here is at the core of what the First Amendment is designed to protect, and is essential to the proper functioning of our system. The general public has a right to hear, through the media, first-hand accounts of current conditions in prison, whether they reveal unsafe and abusive behavior or simply the banal realities of life on death row and what brought them there. In-person communication also affords the wrongly accused a forum to proclaim their innocence — a message that public officials are loathe to hear. Failure to provide direct media access to these inmates reduces the chance that their claims of innocence will be heard and investigated. Each of these essential communications reveal facts unlikely to be brought

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[1] Pursuant to Rule 37, counsel for all parties received timely notice of the intent to file this brief and letters of consent from counsel for all parties are being filed contemporaneously with this Brief. No counsel for any party authored this brief in whole or in part or made any monetary contribution for the preparation or submission of this brief.

to light otherwise, deprecating the ongoing review and debate of controversial public policy. As such, the Court owes not deference but the most exacting of First Amendment inquiry.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild is the only bar association in the United States that includes in its membership Jailhouse Lawyers, including those on death row. As the progressive arm of the legal profession, it has argued on behalf of prisoners' rights for over 70 years. Guild members have brought litigation aimed at raising awareness of and correcting unconstitutional practices in correctional facilities. *Amicus* is co-author, with the Center for Constitutional Rights, of *The Jailhouse Lawyer's Handbook*, an updated version of the Jailhouse Lawyer's Manual, originally published by the Guild in 1974.

Guild attorneys defended inmates in lawsuits arising from the 1971 Attica prison uprising in New York State, the most violent uprising in American

history that resulted in the deaths of 39 men on September 13, 1971. *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971). More recently, Guild attorneys exposed a pattern of abuse of over 450 female inmates who alleged that they had been sexually assaulted by male employees of the Michigan Department of Corrections over a five-year period. The trial team provided litigation and social services to the inmates for over 12 years. *Neal v. the Michigan Department of Corrections*, 232 Mich. App. 730, 592 N.W.2d 370 (Mich. Ct. App., 1988), *appeal after remand*, 2009 Mich. App. LEXIS 182 (Jan. 27, 2009).

Amicus submits that its intimate familiarity with the United States criminal justice system, and its decades of representing death row inmates, renders its perspective on the issues of inmate communications with members of the press of value to the Court in evaluating the issues presented.

ARGUMENT

I. INTRODUCTION

This Court should accept review of this matter in part because the stakes are so high. The curtailed speech is essential to creating the sort of robust exchange of ideas that our system relies upon to ensure a democratic check on policies in the extremely delicate area of capital punishment. By denying death row inmates uncensored access to the press, the general public is denied access to accurate information about the conditions inside prisons. Issues such as guard brutality against inmates,

inadequate health care, sexual harassment of inmates and inmate-on-inmate violence should necessarily be of concern to the public, including legislators and government officials. Without media coverage of such issues, there can be no effective watchdog role by outsiders and interested organizations. Thus, inmates, reporters, and the public as a whole are denied essential rights under the First Amendment.

Moreover, this Court should accept review in order to clarify that its rulings granting deference to prison authorities in some respects is not to be read as circumventing the most fundamental free speech guarantees in our system — namely, that viewpoint discrimination and the purposeful shutting down of the marketplace of ideas is unconstitutional. The decision below represents a departure from the judiciary's longstanding respect for free speech and association, the bedrock on which representative democracy is built. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

In denying certain inmates face-to-face access with members of the press, the government relies upon its caricature of a "jailhouse-celebrity" seeking a public forum and celebrity status and — most essentially — espousing viewpoints the government finds distasteful. The government provides no evidence of actual danger. Rather, its sole basis seems to be then-Attorney General John Ashcroft's concern that death row inmates' speech will have a negative effect on society.

II. THE GOVERNMENT MAY NOT SHROUD THE REALITIES OF THE SYSTEM IT OPERATES

An essential purpose of the First Amendment is to allow for an informed public that can serve as a democratic check on the judiciary and criminal justice system. As this Court has noted regarding its own precedent:

> There is certainly language in our opinions interpreting the First Amendment which points to the importance of "the press" in informing the general public about the administration of criminal justice. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-492, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), for example, we said "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-573, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980). No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgement by the government.

Wilson v. Layne, 526 U.S. 603, 612-13 (1999).

Perhaps the most controversial power exercised by this system today is the sentence of death and process of execution. For the government to deny reporters and their viewers first-hand accounts of a death row inmate's conditions of confinement and mental and physical condition while awaiting execution is to create an unconstitutional shroud, hiding essential information about the exercise of the state's ultimate power over its citizens.[2]

If the reactions of jurists around the world and commentators in this country are any indication, a public that fairly and impartially considered the real conditions of death row would demand change. Scholars and advocates are increasingly concerned with the real effects of death row, and several nations have refused to extradite persons to the United States, not because they ultimately would be put to death, but because the mental and other tortures of awaiting death in our system are so horrific as to violate basic human rights. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989); *Pratt v. Attorney General for Jamaica*, (1994) 2 A.C. 1 (Privy Council 1993)(Jamaica); *U.S. v. Burns*, [2001] 1 S.C.R. 283 (Canada) (noting "the death row

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[2] The United States correctional population has skyrocketed over the past two decades, with a record number of Americans serving time in corrections systems in 2007. One in every 31 adults is serving time in jail or prison and is on probation or on parole. In 1982, one in 77 adults was in the system. At year end 2007, 35 states and the federal prison system held 3,220 prisoners under sentence of death. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm. Given these numbers, it is in society's best interest to have access to information about prison conditions.

phenomenon"); Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 Mich. J. Int'l L. 103 (2002); Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 Eur. J. Int'l L. 833, 846 (2000); Natalia Schiffrin, *Current Development: Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 Am. J. Int'l L. 563, 565 (1998); Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 St. Louis U.L.J. 699, 704 (1996); Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row - Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon"*, 30 Geo. Wash. J. Int'l L. & Econ. 39, 57 (1996); Avi Salzman, *Killer's Fate May Rest on New Legal Concept*, N.Y. Times, Feb. 1, 2005, at B6.

This case calls upon the Court to ensure transparency and public oversight. In order to inform the public about conditions in correctional facilities, it is essential that inmates are afforded the opportunity to communicate directly with members of the media, without prison intervention and censorship. Prison bureau regulations that are not related to valid penological concerns should not be permitted to stand as a barrier to a transparent system.

A. Death Row Interviews Are an Important Part of a Variety of Discussions That Are Deserving of First Amendment Protection

The former Attorney General's basis for imposing these restrictions is anathema to core Constitutional values. Rather than keeping offensive views out of the public discourse, it is axiomatic that the First Amendment ensures an open marketplace of views and ideas[3] and may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The government itself notes that persons sentenced to death and their advocates frequently seek out media attention in hopes of creating public discussion about their case and the legitimacy of the death penalty as a whole. That in-person interviews, as a critical means of allowing the public to see death row inmates as real human beings, are an important aspect of one side's arguments is perhaps too obvious for comment. *See e.g. Writing for their*

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[3] The principle that ideas should be tested in an open marketplace rather than deemed unacceptable by the government is traceable to a dissent by Justices Holmes and Brandeis. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) ("The ultimate good desired is better reached by free trade in ideas — the . . . best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). This would become one of our most widely accepted values. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Lives (Marie Mulvey-Roberts, Ed., 2007); Mumia Abu-Jamal, *Live from Death Row* (Harper Perennial 1996).

But supporters of the death penalty also seek out personal interviews with death row inmates, and use these interviews in the ongoing public debate over capital punishment. *See e.g.* Robert Blecker, *Current Issues in Public Policy: But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply*, 5 Rutgers J. L. & Pub. Pol'y 9 (2007) (relying on personal interviews with death row inmates to argue for the death penalty, and complaining of lack of access to the New Jersey death row and the resulting lack of specific information for his testimony before the legislature, which ultimately eliminated the death penalty).

Just outside the debate over the ultimate legitimacy of capital punishment, the extreme circumstances under which people on death row live need to be explored — fully, openly, and in a manner befitting a free and democratic society — so the public can consider its impact on other important public policy questions. The case of Ambrose Harris is instructive in this regard. No opponent of the death penalty would ever use Mr. Harris as its poster boy. He was "[s]o remorseless . . . for raping and shooting a young Pennsylvania woman in the back of the head that he mockingly dabbed his eyes with a handkerchief as the victim's father sobbed on the witness stand." Jeremy Peters, *Revisiting Violent Past on Eve of New Jersey Death Penalty Vote*, N.Y. Times, Dec. 10, 2007. Yet as people learned of his abusive upbringing, mental condition, and the system's failure to deal with him despite

multiple encounters with him when he was young, his story became a significant touchstone as the public considered these factors in broad discussions about personal accountability, social services, and the importance of good early intervention in child abuse cases. *Id.*

Even apart from any political agenda, criminologists and sociologists rely upon personal interviews with death row inmates in order to advance scientific understandings. *See e.g.* Amy Smith, *Not 'Waiving' But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. Pub. Int. L.J. 237 (2008); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 Ind. L.J. 155 (2005); Michael L. Radelet, *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. Fam. Issues 593 (1983); Doug Magee, *Slow Coming Dark: Interviews on Death Row* (Pilgrim Press, 1980) (one sociology professor reviewing the book noted that, "the author does not excuse the inmates for crimes committed, [but] the interviews do provide an interesting, humanistic perspective generally absent in discussions of capital punishment among both learned and lay persons," Dennis L. Peck, *Book Review*, 11 Crim. Just. Rev. 59 (1986)).

Often, the arts dramatize real events in socially valuable ways that cannot be accomplished absent access to death row inmates. *See* Udani Samarasekera, *Theatre: Surviving Death Row*, 367 Lancet 894 (2006) (theater review in the renowned medical journal of the play "The Exonerated [which] tells the true stories of six innocent survivors of

death row; the words are taken verbatim from legal documents, personal interviews, and newspaper articles. The dramatization reveals the human consequences of gross miscarriages of justice, and exposes the disturbing flaws in the USA's legal system.")

Thus, interviews with death row inmates are important to a variety of socially valuable discussions. By and large, the public relies upon the media to bring this information to them. The elimination of journalistic interviews with death row inmates would harm the civic discourse as well as remove a wealth of material worthy of scientific study, legislative consideration, and critical artistic exposition.

B. Media Coverage Increases the Rate of Exonerations of Innocent Death Row Inmates

It is an undeniable fact: innocent people are languishing on death row, and the media has played an intractable role in investigating and publicizing erroneous convictions. From when the Supreme Court reinstated the death penalty in 1976, *Gregg v. Georgia*, 482 U.S. 153 (1976), until November 2009, some one hundred thirty-nine former death row prisoners have been exonerated. Death Penalty Information Center, www.deathpenaltyinfo.org; *see also* Michael L. Radelet, *Given That We Know We Sometimes Convict Innocent People, What, If Anything, Does That Say About the Death Penalty?: The Role of The Innocence Argument in*

Contemporary Death Penalty Debates, 41 Tex. Tech. L. Rev. 199 (2008).

It has long been recognized that "an unpredictable element which can affect whether an innocent person is released is the involvement of the media." *See* Staff Report, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103d Cong. (issued October 21, 1993).

The sources that members of the press rely on can greatly shape public perception, and even the legal outcomes, of capital defendants' cases. Many reporters depend on the police and prosecutors' versions of events, giving virtually no coverage of the defense attorneys or defendants. Dramatic coverage from the victim's perspective often obscures reporting on problematic witness identification. *See* Jon Whiten, *Enabling False Convictions: Exoneration Coverage Overlooks Media Role*, Fairness & Accuracy in Reporting, November/December 2007.

On the other hand, investigative journalism that relies upon in-person interviews can not only bring injustices to light but provide a sufficient "public face," so as to move lawyers and others to action. Thus:

- In 1988 the television program 60 Minutes featured a segment on the case of Walter McMillian, who had been erroneously convicted of murder on the basis of perjured testimony of three eyewitnesses even though the defense produced two witnesses placing him at a church fundraiser when the murder

occurred. The news report was central in securing McMillian's 1993 exoneration and release from prison. Stanley Cohen, *The Wrong Men: America's Epidemic of Wrongful Death Row Convictions* (Da Capo Press, 2003) at 185, 187.

- Film producer Errol Morris uncovered evidence of prosecutorial misconduct in the case of Randall Dale Adams. A year after he presented Adams's story in the 1988 film *The Thin Blue Line*, Adams was freed. *Id.* at 51-53.

- Investigations by the Detroit News about a key prosecution witness's lies contributed to the dropping of charges and death sentences in 1976 against Thomas Gladish, Richard Greer, Ronald Keirie, and Clarence Smith. *Id.* at 90.

Limiting journalists' in-person contact with death row inmates renders it difficult for reporters to engage in true investigative journalism and to evaluate a case from all perspectives, not just that of the prosecution or victim. In this respect the prison regulations at issue serve to impede fair reporting on death row cases, including those involving the possibility of innocence and exoneration.

C. The Rules at Issue Effectively Eliminate a Singular Viewpoint

Given the heightened security concerns and political context of death row, information coming

directly from death row is already highly restricted. *See e.g.* Mumia Abu-Jamal, *All Things Censored* (Seven Stories Press, 2003) (documenting political pressures that led to cancellation of NPR radio broadcasts from death row). A recent study documented several impediments to journalistic access, including denial of face-to-face interviews with certain inmates (even with the inmates' permission), virtual lack of access to maximum security prisons and segregation units, lack of confidentiality for inmate and staff interviews, inability to shield inmates from retaliation for speaking to members of the press, limitations to using cameras and audio records and even paper and pens, and "a sense that responses to their requests are arbitrary rather than reflecting a thoughtful, consistently-applied policy." John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* (Vera Institute of Justice, 2006) at 97-98.

The absolute prohibition on in-person accounts from inmates and the other obstacles created by the policies at issue in this case go too far. In denying face-to-face visits, the Bureau of Prisons denies the public and government of its oversight role. *Id.* at 98. In order to facilitate this role, the media must have as wide access as possible to prisons, constrained only by reasonably tailored measures based on valid security concerns.

III. THESE RULES ARE NOT BASED ON LEGITIMATE PENOLOGICAL INTERESTS

Attorney General Ashcroft said that the ban on one-on-one interviews was to prevent death row inmates from influencing our "culture" by in effect glamorizing a culture of violence. (App. 90a.) He is not the first government official to associate public communication or broadcasting of death row inmates with "glamorization."[4] Yet, just because some in society may deem death row inmates heinous criminals and their speech unpopular does not mean that this Court can permit the government to inhibit their speech. As Justice William Brennan said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

The rule at issue in this case contravenes the Amendment's protection of unpopular speech. Time and time again this Court has reaffirmed the need to protect unpopular speech. This case presents the Court with the chance to uphold the heart of the

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[4] For example, in 2000 United Colors of Benetton featured an advertising campaign featuring interviews with and pictures of death-row inmates. Response from the public and from advertisers was immediate and negative. Sears pulled all brands owned by global parent company Benetton in response. The California Assembly called the ads a "pathetic glamorization of heinous criminals," House Leader Scott Baugh (R-67th district) drafted a resolution, which passed by an overwhelming 59-8, urging all California State residents to boycott Benetton until they killed the campaign.

First Amendment in a situation in which society's least popular — death row inmates — seek to communicate in person and without censorship to members of the press, thereby showing that fundamental protections apply equally to all in society. As Justice John Paul Stevens wrote, the isolation of inmates in strict confinement situations, and the severity of constitutional deprivations, should cause the Court to ensure that a prison regulation complies with "the sovereign's duty to treat prisoners in accordance with 'the ethical tradition that accords respect to the dignity and worth of every individual.'" *Beard v. Banks*, 548 U.S. 521 (2006) *citing Overton v. Bazzetta*, 539 U.S. 126, 139 (2003).

The dissent in the court below made clear that there is ample evidence that that the rationale for these rules is to silence unpopular viewpoints, in violation of longstanding and essential First Amendment values:

> [The majority ignores] Attorney General Ashcroft's statement that "as an American who cares about our culture" and is "concerned about the irresponsible glamorization of a culture of violence," he wanted to prevent death-row inmates, and only death-row inmates, from engaging in face-to-face interviews with the media on any subject. This rationale for censorship assumes that what death-row inmates have to say, if broadcast outside the prison, necessarily corrodes American culture. But First Amendment

> jurisprudence is grounded in the idea that the government may not prevent a person, including a prisoner, from speaking merely because it disapproves of the speaker or what the speaker might say. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "content-based restrictions are presumptively invalid"); *Turner [v. Safley]*, 482 U.S. [78,] 90 [(1987)] (stating that prison regulations that infringe on inmates' First Amendment rights must operate "in a neutral fashion, without regard to the content of the expression"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

Hammer v. Ashcroft, 570 F.3d 798, 806 (7th Cir. 2009) (Rovner, J., joined by Bauer, J., dissenting).

This Court has the opportunity to uphold the fundamental right to free speech and to afford transparency to the penal system's workings by reversing a recent trend of curtailing inmate's rights. This Court's past decisions granting deference to corrections officials are premised upon a limited judicial role in policymaking. But the wisdom of the Constitution in leaving policy decisions to the more democratically responsive branches is undermined if this Court does not uphold First Amendment principles that ensure an informed public, able to

serve as a meaningful check on those branches and the danger of policymaking based on prejudice rather than facts. By permitting one-on-one access between death row inmates and members of the media, the Court will restore a foundational right in our system.

CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to grant certiorari in this matter and reverse the decision below.

DATED: November 25, 2009

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IN THE
Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER,

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-THREE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are twenty-four of the nation's leading news media organizations — The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The American Society of News Editors, The Association of American Publishers, Inc., The Citizen Media Law Project, Community Newspaper Holdings, Inc., Cox Media Group, Inc., The E.W. Scripps Company, The First Amendment Coalition, The Foundation for National Progress, Gannett Co., Inc., The Hoosier State Press Association, The Hoosier State Press Association Foundation, The Human Rights Defense Center, MediaNews Group, National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, The Radio-Television Digital News Association, The Society of Professional Journalists, Stephens Media LLC, Tribune Company, and The Washington Post.

This case concerns an issue critical to the press and the public in general: whether the federal government may prohibit death row inmates from talking to the press about the abuse, mistreatment, and

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

actions of other inmates; whether it may prohibit all in-person interviews with death row inmates; and whether these draconian restrictions may be valid even where the officials responsible for the rules admitted they were motivated by a desire to keep disfavored viewpoints from reaching the public.

SUMMARY OF ARGUMENT

David Hammer, like other men on the federal government's death row, was prohibited from speaking in person with the press. He also was prohibited from discussing any other inmate whether in person, by phone, or by letter. *Amici* urge the Court to accept this case and make clear that the Constitution does not allow prison rules that provide inmates no means of uncensored communication with the press — especially rules enacted with the *express purpose* of suppressing distasteful viewpoints.

Prohibitions on inmate interviews imperil vital communication. Through interviews with inmates, journalists regularly expose prison rape and other abuse, document poor conditions and unhealthy environments in the nation's prisons and jails, allow the public to monitor how its tax dollars are spent within prisons, and spur reforms across the country. *See* infra, Section I.

Recognizing the importance of the First Amendment even in the prison context, this Court in *Turner v. Safley* ruled that prisoner speech can be curtailed only when a regulation "is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). Among other factors, the test considers whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it," and whether "alternative means of exercising" First Amendment rights "remain open to prison inmates." *Id.* at 89-91. This Court repeatedly has made clear that the *Turner* factors are "the basic substantive legal standards" for judging regulations like the ones

at issue here. *Beard v. Banks*, 548 U.S. 521, 528-29 (2006).

But the *en banc* majority below did not even purport to apply the *Turner* test, relying instead on earlier cases.[2] As a result, the court approved restrictions that prevented death row inmates from having *any* uncensored contact with the news media. The Special Confinement Unit (SCU) Media Policy, as enforced, prohibited Hammer from speaking by *any means* about the treatment, conditions, and activities of other prisoners. Hammer produced evidence that this was the case, and requested the opportunity to develop more via discovery. But the case was dismissed before he could do so. *See* infra, Section II.

Moreover, the *en banc* court ratified rules that are unrelated to penological interests. Indeed, there was not even a pretext of penological concern until after the rules were implemented. The Attorney General who ordered the rules announced, at a press conference, that his interest was in preventing the public from hearing the distasteful viewpoints of federal death row prisoners. *See* infra, Section III.

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[2] For example, the *en banc* opinion begins by noting that reporters "have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." App. 1a (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)). This misses the point. *Pell* dealt with the rights of reporters to gain access to prisons. This case, like *Turner*, deals with the related but analytically distinct right of an *inmate* to speak with the press.

Amici do not dispute that incarceration necessitates some limits on inmate rights and privileges. At the same time, however, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. This is *especially* important in the death row context, because journalists generally cannot learn about prison conditions from former death row inmates. The Court should accept this case and make clear that restrictions on prisoner speech must leave open some means of uncensored communication with the news media, and they must be motivated by penological, rather than merely political, interests.

ARGUMENT

I. The decision below imperils valuable communication between inmates and the press.

Inmate interviews are valuable for exposing abuse, documenting poor conditions and waste in prisons, and promoting social reform and fiscal responsibility. In recent decades, prisoner interviews and correspondence have allowed the press to report about prison rape, prison violence, and the treatment of vulnerable inmates.[3]

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[3] *Amici* do not "confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." *See Houchins v. KQED*, 438 U.S. 1, 13 (1978). But these examples show that the decision below is especially important to correct because its effects stretch far beyond Hammer and similarly-situated inmates, to affect the public's understanding of the penal system.

All of this is possible because reporters and authors were able to interview inmates without government censorship. But the decision below permitted blanket restrictions on the speech of death row inmates. And the court's reasoning is so broad that it would seem to give prison officials the discretion to curtail *any* inmate's speech whenever a court can "imagine" a legitimate reason for the restrictions (*See* App. 5a).[4]

A. Inmate interviews expose abuse and spur prison reform.

Communications between prisoners and the press, including discussions about other inmates, have long played a valuable role in exposing inhumane conditions and abuse in the country's prisons and jails.

For example, *The Washington Post* published a Pulitzer Prize-winning investigative series on inmate rape in 1982. The series told a litany of stories about men detained at a Maryland jail — many later acquitted — whose reports of rape were ignored by corrections officials. The piece included the story of

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[4] The First Amendment rights of pretrial detainees and those of post-conviction prisoners are analytically distinct. *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 564 & n.11 (1978). *Amici* discuss examples involving both because the public interest in speaking with both detainees and prisoners, in both the state and federal systems, is similar. Indeed, there is a *stronger* interest in interviewing death row inmates, who presumably will never return to society, than those held at facilities former inmates of which can be interviewed after they leave.

Ronald Fridge, an 18-year-old waiter who was briefly jailed after a verbal dispute with his landlady over rent. Fridge told reporters that another inmate raped and assaulted him while he was awaiting trial. He said he complained to corrections officials after the first rape but was left in a cell with the aggressor for two days, during which time he was raped "again and again." Another inmate interviewed by a reporter said he helped the alleged aggressor rape Fridge.[5] The story provided a unique window into a dysfunctional jail, and it had two important effects: three months after the story ran, the paper reported that conditions had improved at the detention facility due to new safety measures enacted in response to the exposé.[6] And the next month, a grand jury indicted seven men implicated in sexual assaults uncovered in the inmate interviews.[7]

Nor is this example unique. In 1994, the Massachusetts Department of Corrections launched an effort to curb prison rape after a *Boston Globe* series focused on inmates who told reporters they were sexually assaulted — and, in at least one case, in-

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[5] Loretta Tofani, *Terror Behind Bars: Most Victims of the Sexual Attacks are Legally Innocent*, THE WASHINGTON POST, Sept. 26, 1982, at A1.

[6] Loretta Tofani, *Improved Conditions Reduce Assaults in P.G. Jail*, THE WASHINGTON POST, Dec. 31, 1982, at B1.

[7] Loretta Tofani and Tom Vesey, *Seven Are Indicted in Sexual Assaults at Prince George's Jail*, THE WASHINGTON POST, Jan. 14, 1983, at A1.

fected with HIV — behind bars.[8] Five months later, the state prosecuted its first-ever prison rape case.[9] In another case, a Florida death-row inmate alerted a newspaper about beatings that later resulted in an inmate's death, imploring that someone "get the Feds in here ... to stop this before someone gets killed."[10]

B. Inmate interviews provide unique insight into prison conditions.

Aside from coverage of rape and other violence against inmates, media interviews have exposed unhealthy conditions and prisons' failures to provide medical assistance to inmates. For example, a 2007 *Boston Globe* series on prison conditions for the mentally ill incarcerated in Massachusetts examined the soaring number of inmate suicides in the state dur-

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[8] Charles M. Sennott, *Prison system enacts reforms to stop inmate rape*, THE BOSTON GLOBE, Nov. 9, 1994, at B1; *see* Charles M. Sennott, *Prison's hidden horror: Rape Behind Bars*, THE BOSTON GLOBE, May 1, 1994, at B1, Charles M. Sennott, *AIDS adds a fatal factor to prison assault: Rape Behind Bars*, THE BOSTON GLOBE, May 2, 1994, at B1.

[9] Charles M. Sennott, *Prison system enacts reforms to stop inmate rape*, THE BOSTON GLOBE, Nov. 9, 1994, at B1.

[10] Meg Laughlin, *Inmate Letter Warned of Beatings*, THE MIAMI HERALD, July 27, 1999, at A1; *see also* Beth Kassab, *5 Guards Go Free in Killing: Charges will be dropped in the fatal beating death of death-row inmate Frank Valdes*, ORLANDO SENTINEL, May 11, 2002, at A1; Noah Bierman and John Pacenti, *State drops effort to try guards for inmate's death*, THE PALM BEACH POST, May 11, 2002, at 1A; Rich Rucker, *Prisons work to cut inmate abuse*, FLORIDA TIMES-UNION, Nov. 17, 2001, at B1.

ing a two-year period.[11] A special investigative team interviewed a 28-year-old mentally-ill inmate who twice had attempted suicide and described the horrors of solitary confinement that had driven him to the brink and other inmates over the edge.[12] In the wake of the series, state lawmakers called for swift action to change the state's treatment of the mentally ill behind bars.[13]

Similarly, the *Chicago Tribune* profiled a former death row inmate who developed paranoid schizophrenia while on death row.[14] A 2008 book for young adult readers featured interviews with death row inmates sentenced for crimes they committed when they, too, were teenagers.[15] And the *Denver Westword News*'s correspondence with inmate Troy Anderson prompted a news report that the inmate had been seeking evaluations for medications for two

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[11] Beth Healy, *Breakdown: The Prison Suicide Crisis; A system strains, and inmates die*, THE BOSTON GLOBE, Dec. 9, 2007, at A1.

[12] Jonathan Saltzman and Thomas Farragher, *Breakdown: The Prison Suicide Crisis; Guards, inmates a volatile dynamic*, THE BOSTON GLOBE, Dec. 11, 2007, at A1.

[13] Michael Rezendes and Thomas Farragher, *Patrick aide spurns prison policy change; Rejects call to ban solitary confinement for the mentally ill*, THE BOSTON GLOBE, Dec. 12, 2007, at B1.

[14] Barbara Brotman, *Hard Time: Killer Says Prison Caused the Mental Illness That's Now Keeping Him There*, CHICAGO TRIBUNE, Dec. 1, 1991, at 1.

[15] Susan Kuklin, NO CHOIRBOY: MURDER, VIOLENCE, AND TEENAGERS ON DEATH ROW (2008).

years and was told he would not be released from solitary confinement without them. Days after the alternative weekly newspaper inquired about the delay, Anderson saw a psychiatrist.[16]

Journalists' communications with immigrants detained in federal facilities also have helped shed light on the post-Sept. 11, 2001 operation of immigration detention centers. This included, for example, stories about an Ivory Coast pilot held as a material witness in a hijacking probe for four months before being interviewed,[17] and a U.S. resident fighting deportation who reported being unable to get proper care for tumors and other medical problems in an Arizona prison.[18]

C. Inmate interviews help citizens monitor how their tax dollars are spent.

Inmate health and safety aside, prisons and jails represent a massive public investment. Interviews

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[16] Alan Prendergast, *Head Games*, DENVER WESTWORD NEWS, September 21, 2006, *available at* www.westword.com/2006-09-21/news/head-games.

[17] *See* Amy Goldstein, *'I Want to Go Home'; Detainee Tony Oulai Awaits End of 4-Month Legal Limbo*, THE WASHINGTON POST, Jan. 26, 2002, at A1; Amy Goldstein, *A Sept. 11 Detainee's Long Path to Release; After Final Glitch, Ivory Coast Native is Home*, THE WASHINGTON POST, Nov. 12, 2002, at A3.

[18] *See* Amy Goldstein and Dana Priest, *In Custody, In Pain; Beset by Medical Problems as She Fights Deportation, a U.S. Resident Struggles to Get the Treatment She Needs*, THE WASHINGTON POST, May 12, 2008, at A1.

with inmates provide one way for the public to monitor how its money is being spent.

Today, only Medicaid costs are growing faster than criminal corrections spending, which outpaces state budget growth in education, transportation, and public assistance.[19] Correctional facilities cost states $47 billion in 2008, according to a Pew Center of the States Report that revealed that one in thirty-one adults, or 7.3 million Americans, are either in prison, on parole, or on probation. The Pew report found that fifteen states now spend more than $1 billion of their annual budgets on their correctional systems. Michigan, for example, dedicates 22% of its general fund spending to its correctional systems.

Press interviews with inmates have long helped the public keep an eye on these essential, but very expensive, public institutions. In North Carolina, for example, journalists who interviewed an inmate discovered that a prison doctor who was earning $110,000 for full-time employment actually spent less than two hours a day in the facility. After the report, a class action suit against the doctor emerged, the doctor resigned, and officials stepped up plans to expand medical facilities for prisoners.[20]

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[19] *One in 31: The Long Reach of American Corrections*, THE PEW CENTER ON THE STATES, March 2, 2009, *available at* http://www.pewcenteronthestates.org/report_detail.aspx?id=49382.

[20] Gloria Romero, *Access Needed to Report on Prison Conditions*, THE DAILY NEWS OF LOS ANGELES, April 29, 2004, at N17.

II. The court below erred in approving a policy that allows no method of uncensored communication with the press.

Despite the value of prisoner interviews, the SCU Media Policy limits "all avenues of communication" between prisoners and the press, providing what Judge Wood called "an all-too-effective way to prevent the public from ever learning about" prisoner abuse or unhealthy conditions. (App. 28a). The Policy, by forbidding one inmate from discussing another inmate under any circumstances and regardless of the medium, eviscerates prisoners' First Amendment rights and undermines the public's access to a unique and important source of information about prisons.

The First Amendment demands more. This Court repeatedly has suggested that abridgements of inmates' First Amendment rights are tolerated if, and only if, alternative means of communication with the press and other members of the public are available. The lack of *any* free channel of communication between journalists and inmates is contrary to established jurisprudence regarding prisoners' rights and this Court's recognition that the conditions in U.S. prisons are a matter that is both newsworthy and of great public importance. *See Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974).

A. Previous limits on inmate speech allowed some means of uncensored communication.

Prisoners retain constitutional rights even while incarcerated, including free speech rights and the

First Amendment right to petition the government for a redress of grievances. *Turner*, 482 U.S. at 84 (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). These rights may be regulated as a consequence of incarceration, but only if "there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90.

The Court explained in *Procunier v. Martinez* that the interest of "prisoners and their correspondents in uncensored communication ... grounded as it is in the First Amendment, is ... protected from arbitrary governmental invasion." 416 U.S. 396, 417-18 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (citations omitted). In addition to the speech interests at stake, contact with the press is one essential method of petitioning the government. Indeed, media coverage not only describes the criminal legal process, but also "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *see also Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971) (recognizing a constitutional "right to send letters to the press concerning prison matters" and adding that "[t]he argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear").

When this Court has approved restrictions on prisoner speech, it has done so in part because the restrictions were narrow enough to allow alternative, unfettered means of expression. Thus, in *Saxbe*, the

Court allowed a policy barring face-to-face communication in part because the policy allowed unlimited, uncensored outgoing correspondence with journalists, and prison authorities were required to "give all possible assistance" to press representatives "in providing background and a specific report" concerning any inmate complaints. *Saxbe v. Washington Post Co.*, 417 U.S. 847-48 (1974). In *Fell*, the Court noted that prison officials should be accorded deference with regard to regulating "the entry of people into the prisons for face-to-face communication with inmates." *Pell*, 417 U.S. at 826. But this was only the case "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved" in the policy. *Id.* Thus, the *Pell* Court approved restrictions on in-person interviews in part because "it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media." *Id.* at 824. Both cases thus held that "[d]enying media access to conduct face-to-face interviews with inmates is constitutional *as long as* alternative means for communicating with the media are available." *Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993) (emphasis added).

B. The Media Policy, as enforced, allows death row prisoners no unfettered communication with the press.

The *en banc* majority recognized this Court's admonition that regulations on prisoner speech should include some manner of unfettered communication with the press. "A system of rules that permitted

prison administrators to conceal beatings or starvation of prisoners, violations of statutes and regulations, and other misconduct would be intolerable," it conceded. (App. 13a). "The Court said as much in *Pell* and [*Saxbe*]. It was important to both decisions that all prisoners could correspond freely with reporters, even though face-to-face interviews were impossible." (*Id.*).

The court below nevertheless approved the SCU Media Policy's interview restriction, in part because it assumed that written correspondence provided an inmate with a reasonable alternative means of communication. "As far as we can tell," the *en banc* majority found, the prohibition on speaking about other inmates "applies to interviews (in person or by telephone) but not to correspondence." (App. 13a). The majority assumed that "an inmate's letters to reporters are not subject to inspection or censorship" and concluded that if "another inmate is beaten and unable to talk, Hammer remains free to send a letter informing a reporter about that event. *Pell* and [*Saxbe*] held that free correspondence supplies the needed channel of communication." (App. 2a, 14a-15a).

But the record reflects a different reality, Judge Rovner noted, in which "an inmate could be disciplined for informing the media — whether on the phone or by letter — that another inmate is being abused by a guard." (App. 20a). Contrary to the majority's assumptions, the government *conceded* that "death-row inmates are not allowed — through any method of communication — to discuss other inmates with members of the media." (App. 19a-20a). It also conceded that "all mail sent by inmates at the Spe-

cial Confinement Unit must be given to prison officials unsealed for inspection before it is mailed." (App. 20a). And "[w]hen asked what would be the consequence to an inmate who sends a letter discussing another inmate, counsel for the government had no answer." (*Id.*). Indeed, the record reveals that Warden Harley Lappin told Hammer that: "You are hereby ordered not to provide any information concerning other inmates during news media interviews, social calls, or correspondence with the media." (App. 25a). At one point, prison officials even "disciplined Hammer for providing information about a fellow death row inmate to a reporter." (App. 33a).

Hammer was not permitted discovery in order to fully develop the record — rather than respond to his discovery requests, the government sought, and received, summary judgment in its favor. (App. 36a); *cf. Prison Legal News v. Cook*, 238 F.3d 1145, 1150 (9th Cir. 2001) ("When the inmate presents sufficient ... evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, ... the state must present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational") (internal citations omitted). On the anemic and fuzzy record that did exist, Judge Wood noted, the court was left to guess "whether there is any satisfactory alternative for inmates at the Special Confinement Unit to give the media any information that involves other inmates." (App. 20a). The majority simply assumed that, "[a]s far as we can tell," inmates were able to send uncensored mail to journalists. (App. 13a).

And this is no small assumption. "Without the linchpin provided by its assumption that correspon-

dence is free," Judge Wood argued, "the majority's rationale collapses." (App. 20a). At the very least, Hammer deserves the opportunity to prove his claim that the Policy, as enforced, left him with no means of unfettered communication with the media.

III. Public oversight of prisons will suffer if this decision, allowing the content-based suppression of speech, stands.

The primary test of whether a regulation on inmate speech is permissible is whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (internal quotation omitted).

To meet this test, "the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* at 89-90 (citing *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)). Moreover, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. These considerations are "[f]irst and foremost" among the *Turner* factors — if "the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001).

Other circuits have interpreted *Turner* as requiring that "prison officials actually had, *not just could have had*, a legitimate reason for burdening protected activity." *Salahuddin v. Goord*, 467 F.3d 263, 277 (2nd Cir. 2006) (emphasis added); *see also Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("Prison officials are not entitled to the deference described in *Turner* ... if their actions are not actually motivated by legitimate penological interests *at the time they act.*") (emphasis added). Because "deference does not mean abdication," *Turner* requires authorities to "first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point." *Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir. 1990); *see also Swift v. Lewis*, 901 F.2d 730, 731 (9th Cir. 1990), *superseded by statute on other grounds* (reversing summary judgment grant where officials failed to show "that the interests they have asserted are the actual bases for their grooming policy"); *Kimberlin v. Quinlan*, 199 F.3d 496, 502 (D.C. Cir. 1999) ("even if appellants provide an objectively valid reason for their actions in this case, the District Court must still inquire into whether there is a disputed issue of fact as to whether appellants were actually motivated by an illegitimate purpose").

Thus, *Turner* upheld a restriction on correspondence because there was testimony that the restriction "was promulgated primarily for security reasons" and "[p]rison officials testified that mail between institutions can be used to communicate escape plans and to arrange assaults and other violent

acts." *Turner*, 482 U.S. at 91. Conversely, the Third Circuit ordered a district court to enjoin a prison policy because prison authorities investigated an inmate "under public pressure to do so, and because of the content of [his] writing." *Abu-Jamal v. Price*, 154 F.3d 128, 134 (3rd Cir. 1998); *see also Kimberlin*, 199 F.3d at 503 (citing lower court finding that "no reasonable prison official could believe that interfering with an inmate's access to the press because of the content of the inmate's speech could be lawful").

The court below rejected this reading of *Turner*, finding it irrelevant whether the government's asserted interest was pretextual and rejecting the idea that "one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a). "The Supreme Court did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry," the court ruled. (App. 10a). This reading eviscerates *Turner*. It also creates a split with the Second, Third, Eighth Ninth, and District of Columbia circuits with regard to an important federal question. *See* Sup. Ct. R. 10(a).

A. The record shows the rules were an attempt to keep the viewpoints of death row inmates from the public.

There is no evidence in the record, beyond *post-hoc* assertions, suggesting that the SCU Media Policy was motivated by any penological interest. To the contrary — the record shows that the policy was motivated by political concerns over suppressing particular viewpoints rather than a concern for safety.

Federal regulations have long allowed inmates to participate in face-to-face press interviews, "not subject to auditory supervision," unless the warden determines that a specific interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution," or other specific criteria are met. 28 C.F.R. § 540.63. The SCU Media Policy creates an exception for death row inmates, flatly prohibiting in-person interviews and barring any discussion of other inmates.[21]

The Policy was created just after Timothy McVeigh appeared on the television news program *60 Minutes*. North Dakota Senator Byron L. Dorgan blasted prison officials for allowing McVeigh to speak with a television news crew. "The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society," he said, "but will also prevent him from further intrusion in our lives through television interviews and from using those forums to advance his agenda of violence." (App. 8a). Dorgan's letter demanded that the Bureau of Prisons revise its regulations and curtail prisoner access to the media so as not to further "dishonor" crime victims. (7th Cir. JA at 175). Of course, the letter reveals Dorgan's personal distaste for the content of what an inmate said,

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[21] As Hammer notes, singling out male death row inmates also creates equal protection concerns. *See* Cert. Pet. 13 ("no other reported decision has ever upheld the constitutionality of a permanent restriction on the First Amendment rights of a subclass of prisoners, particularly a subclass identified solely based on gender and sentence") (emphasis omitted).

rather than any concern that the prisoners and employees of the SCU were being put at risk by McVeigh's comments.

Dorgan's viewpoint-based motivation was echoed by Attorney General John Ashcroft during a press conference announcing the new SCU media policy in April 2001. Standing with Bureau of Prisons Director Kathleen Hawk Sawyer, Ashcroft invoked his distaste for McVeigh's appearance on *60 Minutes* to justify the new ban. "As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium," he said. (App. 90a). "On an issue of particular importance to me as attorney general of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims." (*Id.*).

For these reasons, Ashcroft said, he was ordering that "[m]edia access to special confinement unit inmates will be limited to each inmate's ordinary allotment of telephone time." (*Id.*) Warden Harley Lappin formalized the ban with Institution Supplement THA-1480.05A just three days after the Attorney General's statement. (App. 9a). Ashcroft's statement made clear that his preferences about viewpoints suitable for American culture motivated the interview ban. This frank admission belies any notion that security threats, either real or potential, were at the heart of the ban.

Amici recognize the discretion this Court has granted to prison administrators to curtail in-person interviews with inmates when legitimate interests are at stake and alternatives for communication are present. *See Pell*, 417 U.S. at 822; *Saxbe*, 417 U.S. at

847. *Amici* respectfully suggest that *Pell* and *Saxbe* underestimated the importance of in-person prisoner interviews.[22] But there is no need to revisit *Pell* and *Saxbe* in order to clarify that, where such restrictions are put in place, they must legitimately be motivated by the security concerns present in those cases. The Constitution does not permit the government to cloak content-based restrictions on prisoner speech in *post-hoc* claims of security concerns. Nor does it permit regulations, like these, aimed at suppressing objectionable points of view. *See, e.g., Martinez*, 416 U.S. at 415 (invalidating regulations that "authorized, *inter alia*, censorship of statements that 'unduly complain' or 'magnify grievances,' expression of 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'").

B. The government failed to justify its "jail celebrity" rationale in this context.

The court below found that the SCU Media Policy is justified by security concerns unique to death row inmates. (App. 57a). But these *post-hoc* assertions are not sufficient even under the deferential scrutiny articulated in *Turner*.

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[22] There is no wholly adequate alternative to the in-person interview. *See, e.g., Saxbe*, 417 U.S. at 854 (Powell, J., dissenting) (citing expert testimony and adding that "[o]nly in face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question"). This is particularly true for broadcasters, who rely on images and recordings to tell their stories. *See Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring in the judgment).

The court defended singling out death row prisoners based on a concern they will become "jail celebrities" if they are allowed face-to-face interviews with the press. It is common for prison officials to make similar claims in support of restrictions upon media access to inmates. *See, e.g., Pell*, 417 at 831-832. The *Saxbe* Court thus found that "inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." 417 U.S. at 848-849. The concern under this theory is that media interviews with this type of inmate "increase their status and influence and thus enhance their ability to persuade other prisoners to engage in disruptive behavior." *Id.* at 866 (Powell, J., dissenting).

The concerns presented in *Pell* and *Saxbe* may be reasonable in their specific factual settings, but the government produced no evidence that they apply with any special force to death row prisoners. As Judge Rovner noted, "[i]t is unclear why speaking in-person with a journalist would give an unknown death-row inmate more influence over other prisoners than would, for example, allowing Martha Stewart or George Ryan to give face-to-face interviews during their incarceration, which they would have been or are free to do under the Bureau's policies." (App. 22a).

If anything, the day-to-day conditions of life on death row make it far *less* likely that an inmate could wreak havoc with his or her perceived status as a celebrity. The isolated lives of Hammer and his fellow SCU inmates hardly present an opportunity for Hammer to use any prestige or notoriety he may re-

ceive from an in-person media interview to encourage disruptive behavior in others. Life in the SCU is tightly regulated. There are three classifications for inmates, only one of which allows any contact between inmates. (7th Cir. JA at 200). Even that allowed contact is highly regulated — only four inmates may be placed in the same recreation enclosure. (*Id.* at 206). If a prisoner needs to leave the SCU for any reason, he must be "restrained in front with full restraints, handcuffs, black box, martin chain and leg irons." (*Id.* at 200). During such an outing, the prisoner must be escorted by no fewer than three guards. (*Id.*) And, regardless of their classification, inmates are not allowed contact social visits. (*Id.* at 208).

At the very least, Hammer deserves the opportunity to take discovery on the sincerity and reasonableness of the asserted penological interest. But the government refused to answer his *pro se* discovery requests, and the court below nevertheless affirmed the defendants' motion for summary judgment and dismissed Hammer's claims. (App. 36a).

CONCLUSION

The government has imposed a broad ban on prisoner interviews, motivated by a professed desire to gag unwelcome content and disfavored viewpoints. Such a broad and ill-conceived ban infringes on Hammer's rights, but the effects go far beyond the harm to any individual prisoner.

The SCU Media Policy broadly suppresses valuable speech, and the record suggests it does so by design. As the panel decision below noted, "it can be an

easy thing for an inmate to allege that prison officials are lying about the rationale behind a prison restriction." (App. 45a). But where, as here, an inmate "back[s] up his allegations with admissible evidence from which a reasonable jury could infer that an illegitimate reason lies behind the interview ban," he deserves the opportunity to prove his case. (*Id.*).

Amici respectfully request that the Court accept review of the decision below.

Respectfully submitted,

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(Additional attorneys listed in Appendix B.)

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes over 20 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns, directly or through its subsidiaries, many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the

United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as an amicus on legal issues of importance to the media, including in *Bank Julius Baer & Co. v. Wikileaks.org*, No. 08CV824 (N.D. Cal. Feb. 26, 2008), *Hatfill v. Mukasey*, No.08-5049 (D.C. Cir. March 28, 2008), *Maxon v. Ottawa Publishing Co.*, No. 2008-MR-125 (Ill. App. Ct. Mar. 24, 2009), *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, No. 2009-0262 (N.H. June 30, 2009), and *United States v. Stevens*, No. 08-769 (S. Ct. July 24, 2009).

Community Newspaper Holdings, Inc. ("CNHI"), through its subsidiaries, owns newspapers, television stations, Web sites and niche publications that serve more than 150 communities throughout the United

States. Its titles include The Tribune Star, which is nearby the United States Penitentiary in Terre Haute, Indiana.

Cox Media Group, Inc. ("CMG") is a Delaware privately-held corporation. CMG's direct and indirect subsidiaries and affiliates include companies that own and operate a variety of news media, including television stations, radio stations, newspapers and websites in multiple markets throughout the United States.

The E.W. Scripps Company is a diverse, 130-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service; and United Media, the licensor and syndicator of Peanuts, Dilbert and approximately 150 other features and comics.

The First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press, and open-government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The Foundation for National Progress is a nonprofit, public benefit corporation and the publisher of

Mother Jones magazine in print and online. Mother Jones has been involved in investigative journalism for more than thirty years, during which time it has won numerous awards, including five National Magazine Awards, most recently for General Excellence in 2001 and 2008. With a paid circulation of 230,000, Mother Jones magazine is the most widely read avowedly progressive publication in the United States. Regardless of the political inclinations of the administration in power, however, Mother Jones has relentlessly pursued investigations of the nation's most powerful and socially significant institutions, including the nation's prison system. Access to inmates is an indispensible prerequisite for meaningful investigation of and reporting on the prison system in particular and on the justice system as a whole. It is already extremely difficult to obtain such access, and granting penal authorities unfettered discretion to determine whether, when, and what inmates can communicate to the press will make it virtually impossible.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 84 daily newspapers in the United States, including USA TODAY and The Indianapolis Star, and nearly 850 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and over 100 U.S. websites that are integrated with its publishing and broadcast operations.

The Hoosier State Press Association ("HSPA") is a corporate association whose members include 176 Indiana newspapers. The primary focus of the HSPA is to safeguard and advance the newspaper industry

in the State of Indiana. The corporation is nonpolitical and nonsectarian.

The Hoosier State Press Association Foundation is a non-profit entity whose members include 176 Indiana newspapers and other parties interested in the Foundation's mission. The purpose of the Foundation is to enhance the ability of Indiana newspapers to fully educate and inform the public, and to defend the principles of the First Amendment to the United States Constitution.

The Human Rights Defense Center (HRDC) is a non-profit, charitable corporation that publishes a nationally distributed monthly journal called *Prison Legal News*. Since 1990, *Prison Legal News* has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners in the United States and abroad. *PLN* has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the human and civil rights of prisoners, *PLN* also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. *PLN* has approximately 7,000 subscribers in all fifty states and abroad and eight times as many readers. Approximately sixty-five percent of *PLN* subscribers are state and federal prisoners. The remainder are attorneys, judges, advocates, journalists, academics and concerned citizens. PLN's website, www.prisonlegalnews.org receives approximately 100,000 visitors per month. In addition to publishing *Prison Legal News*, PLN has regularly filed litigation under the First Amendment in federal courts nationwide, challenging prison officials who censor PLN.

MediaNews Group is one of the largest newspaper companies in the United States. It operates or has an ownership interest in 54 daily newspapers in 11 states, with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. Each of its newspapers maintains a Web site focused on local news content, hosted by MediaNews Group Interactive. MediaNews Group also owns a television station in Anchorage, Alaska, and operates radio stations in Texas. The MediaNews Group newspapers and broadcast stations report on a vast variety of subjects, but crime, the punishment of criminals, the prison system, and the judicial system as a whole are the subject of constant investigation and reporting. This reporting includes, among other things, extensive coverage of the ongoing controversy regarding the methodology used for executions by lethal injection. Experience has taught the press that authorities in charge of penal institutions cannot necessarily be trusted to provide complete or accurate information about the conditions within them, and even the most forthright cannot provide the perspective of their inmates. If restrictions on inmates' ability to communicate can be imposed at the whim of the authorities, it is predictable – indeed inevitable – that information critical to the public's assessment of the efficacy and propriety of the conduct of those charged with operating the nation's prisons will be suppressed, shielding from scrutiny and accountability those who need it most.

National Press Photographers Association (NPPA) is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors,

students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism. Given NPPA's over sixty year history in photojournalism, it is well-poised to address the importance of public access to prison issues and to explain how today, such access greatly depends on the presence of audio-visual coverage, which by its very nature necessitates in-person interviews.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of Amer-

ica. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

The Radio Television Digital News Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher whose operations include the Las Vegas *Review-Journal*, the largest newspaper in Nevada. Stephens Media also publishes daily newspapers from North Carolina to Hawaii.

Tribune Company operates businesses in publishing, broadcasting and interactive, including eight daily newspapers, such as the *Los Angeles Times*, *Chicago Tribune* and *Baltimore Sun*, 23 television stations, WGN America and WGN Radio. Popular

websites add breadth and depth to the news coverage provided by these organizations.

The Washington Post is a leading newspaper with nationwide daily circulation of over 647,000 and a Sunday circulation of over 878,000..

APPENDIX B

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